TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 125.

UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANT,

vs.

A. SANDOVAL AND P. SANDOVAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED SEPTEMBER 11, 1909.

(21,815.)

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In the Supreme Court of the Territory of Arizona.

Cause No. 1093.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee.

Appeal from District Court, Santa Cruz County, Second Judicial District, Territory of Arizona.

Lawler, Allen, Van Dyke & Jutten, Fred W. Morrison, and G. P. Bullard, attorneys for appellants.
Eugene S. Ives, attorney for appellee.

Be it remembered that on to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause a certain Judgment Roll, in words and figures following, to-wit:

1 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiff,
vs.
A. SANDOVAL and P. SANDOVAL, Defendants.

Now comes the plaintiff, and complains of the defendants, and alleges and avers:

I.

That the plaintiff is a corporation organized under the laws of the state of Maryland, and has duly filed its Articles of Incorporation with the Auditor of the Territory of Arizona, and the Governor of the Territory of Arizona, and has complied with all the requirements of the law of the Territory of Arizona, to enable it to
2 do business in any county in the said territory, and is authorized to transact business, and to sue and be sued in any Court in the county of Santa Cruz, Territory of Arizona.

II.

That on or about the 11th day of April, 1907, one Epes Randolph recovered a judgment in the above named Court against the above named defendants for the sum of $10,528.33; that the said defendants did appeal from the said judgment recovered against them by the said Randolph as aforesaid to the Supreme Court of the Territory of Arizona, and on or about the 5th day of June, 1907, the said de-

fendants did enter into a certain written application for bond and agreement with the plaintiff in the words and figures following to-wit:

Application for Bond.

1. Name of applicant. A. and P. Sandoval, co-partners, as P. Sandoval & Company.
2. Residence—A. Sandoval, Los Angeles, Cal.; P. Sandoval, Nogales, Arizona.
3. Occupation, Bankers.
4. Business address, Nogales, Sonora, Mexico.
5. Amount of bond required, $21,000. Liab., $10,528.33.
6. Title of case, Epes Randolph vs. A. & P. Sandoval.
3 7. Name of Court in which bond is filed, District Court Santa Cruz County, Arizona.
8. Names and addresses of applicant's attorneys, E. B. Williams, Nogales, Ariz.; A. Orfila, Los Angeles, Cal.

Important Instructions.

a. For Attachment. State the nature and amount of the plaintiffs' claims; the ground of the attachment, giving reference to the statutes authorizing it; character of property attached; if garnishment, give name and address of garnishee; also state if any prior attachments have issued.

b. For Replevin. State facts upon which applicant bases his right of possession; also what disposition will be made of the property pending suit.

c. For Appeal Bond. Recite judgment; give description of real estate owned by the appellant, and whether there is any incumbrance on said property; if so, amount of, and to whom due; also state if judgment will remain a lien upon said real estate pending appeal, and give reference to statute so providing.

d. For Injunction. Attach copy of bill or petition, and of order or decree.

e. All Other Cases. State fully and particularly all the facts of the case.

This is an appeal bond from a judgment of the District Court
4 of Santa Cruz Co., Territory of Arizona, rendered against A. and P. Sandoval on April 11th, 1907, for $10,528.33.

This judgment of record stands until discharged as a lien upon real estate as per Revised Statutes of Arizona, paragraph 2883.

For description of property see next page.

9. Have you any property? If so, give brief description and value of same, and, if incumbered, state for what amount?

A. Sandoval has real property in Los Angeles of the value of $20,000.

P. Sandoval has real property in Los Angeles County, Cal., of the value of $28,400. Upon which there is a mortgage of $4,500, and together A. and P. Sandoval have in Sonora, Mexico, real and personal property of the value of about $500,000.

10. Have you any liabilities? If so, state character and amount of same; and are you endorser or have you become security for any person or persons, partnership or corporations?

None, except as above stated.

11. Give names and addresses of four or more persons not related to you who have known you for some years.

Name.	Occupation.	Address.
1. Anton Proto,	Merchant,	Nogales, Ariz.
2. Wm. Schuckman,	Banker,	Nogales, Ariz.
3. Ramon Vasquez,	Merchant,	Nogales, Ariz.
4. Theo. Gibbs,	Merchant.	

5 We certify that the answers given to the foregoing questions are true, and in consideration of the United States Fidelity and Guaranty Company consenting or agreeing to execute the bond herein applied for, we do hereby covenant, promise and agree to pay the premium or fee herein agreed, viz: One hundred, twenty-three dollars ($123) for the first year, and — dollars ($—) for each year thereafter the bond shall be in force, and at the termination of the case, to furnish said company with satisfactory and conclusive evidence that there is no further liability on said bond; and to reimburse said company for any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature, which said company shall, or may, for any cause, at any time, sustain or incur, or be put to for, or by reason or in consequence of said company having entered into, or executed said bond.

If claim is made against said company on said bond, said company shall have the right to employ its representative to investigate said claim and charge, all expenses of such investigation to — the applicant herein.

And we do further agree if any suit is brought on the bond herein applied for, to permit said company to employ its own counsel or attorney, to defend such suit, and to repay said company the fee of said counsel or attorney, and all other costs and expenses to which said company may be put in the defense of such suit.

6 In testimony whereof, we hereunto subscribe our names and affix our seals this 5th day of June, nineteen hundred and seven.

SANDOVAL CO.,
By P. SANDOVAL. [SEAL.]

Witness:
M. MOLAGER.

III.

That this plaintiff, in consideration of the said agreement did consent and agree to execute a bond therein and thereby applied for, and did on or about said last mentioned date, execute the said bond so applied for; that the said bond was signed by the said defendants, and by this plaintiff, and was payable to the said Randolph, and was in a sum double the amount of the said judgment and costs, and was

conditioned that the said defendant-, appellants, should prosecute their said appeal with effect, and that in case the judgment of the Appellate Court, to-wit: The said Supreme Court should be against them, that they should perform the said judgment, and pay all such damages as might be awarded against them upon the said appeal.

That thereby the said appeal was duly perfected to the Supreme Court of the Territory of Arizona, and came on for hearing before the said Supreme Court, and on or about the 27th day of March, 1908, as this plaintiff is informed and believes, the said Supreme Court of the Territory of Arizona did render judgment affirm-
7 ing the said judgment of the District Court, and did render judgment against the said defendants, and against this plaintiff for the said sum of $10,528.33, together with interest thereon at the rate of 6 per cent per annum, and $37.10, costs of said Supreme Court. That thereafter, and prior to the 15th day of April, 1908, the said A. and P. Sandoval did file their motion in the said Supreme Court for a re-hearing and that thereafter, and on or about the 16th day of May, 1908, the said Supreme Court did deny their said motion for a re-hearing. Thereafter and prior to the 24th day of June, 1908, this plaintiff received notice from the Governor of the Territory of Arizona to the effect that the said judgment of the Supreme Court of the Territory had not been paid, and that more than thirty days had elapsed from the rendition of the said judgment of the Supreme Court, and to the effect that unless the said judgment was paid or sufficient excuse for the non-payment thereof shown, this company would forfeit its rights to transact business as a surety company in the Territory of Arizona. That this plaintiff promptly notified the said defendants of said notice received by them from said Governor as aforesaid, and that said defendants on the 24th day of June, 1907, had wholly failed to pay the said judgment or to appeal therefrom to the Supreme Court of the United States, and that on the 24th day of June, 1907, this plaintiff did duly pay to the said Randolph in satisfaction of said judgment and interest the
8 sum of $11,484.95, and that upon said date said sum was due and owing upon the said judgment.

IV.

That this plaintiff has paid for charges and expenses by reason and in consequence of this plaintiff having entered into and executed the said bond, the sum of $676.75.

V.

That this plaintiff has demanded of the said defendants that they reimburse this plaintiff in the said several sums paid out as aforesaid, and that the defendants have refused to reimburse the plaintiff in said sum or any part thereof.

That in order to collect the said sums from the said defendants, it has become necessary for this plaintiff to employ counsel to bring and institute this action, and this plaintiff has agreed to pay said counsel reasonable fee and charge for the institution and prosecution of this

suit, and as plaintiff is informed and believes, the reasonable cost of the institution and prosecution of this suit will be the sum of $3,000.00, be the same more or less.

Wherefore, plaintiff demands judgment against the defendants for the sum of $13,911.70, together with interest on $11,484.95 thereof, from the 24th day of June, 1908, and on the balance thereof
9 from the date of the commencement of this action, and for costs.

EUGENE S. IVES,
Pl'ff's Att'y.

TERRITORY OF ARIZONA,
County of Pima, ss:

Eugene S. Ives, being duly sworn, deposes and says, that he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

EUGENE S. IVES.

Subscribed and sworn to before me this 30th day of July, 1908.
My commission expires May 9, 1911.

[SEAL.] JOSIE B. HENDERSON,
Notary Public.

Here follows the summons a copy of which is omitted by direction of attorney for appellant.

Demurrer.

(Title of Court and Cause.)

Come now the defendants in the above-entitled cause, and answering the complaint of the plaintiff herein by way of demurrer, for cause of demurrer say that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore, defendants pray judgment, and for costs of suit.

FRED W. MORRISON,
H. S. VAN DYKE,
Attorneys for Defendants.

10 *Answer.*

(Title of Court and Cause.)

Come now the defendants in the above entitled action, and answering the complaint of the plaintiff on file herein, admit, deny and allege as follows:

I.

Defendants have no information regarding the organization of the plaintiff as a corporation under the laws of the state of Maryland, or elsewhere, and as to whether or not their Articles of Incorporation have been duly filed, and the requirements of the law complied with, and therefore deny the allegations contained in the first paragraph of plaintiff's complaint.

II.

Defendants admit that a judgment was obtained on the 11th day of April, 1907, in the above entitled Court by Epes Randolph, and against these defendants.

III.

Defendants further admit that an appeal was taken from said judgment to the Supreme Court of the Territory of Arizona, as set forth in paragraph II of plaintiff's complaint.

IV.

Defendants admit that they made application for a bond from the plaintiff herein, substantially as set forth in paragraph II of plaintiff's complaint.

11

V.

Defendants admit that the plaintiff herein executed said bond and that the Supreme Court of the Territory of Arizona did affirm said judgment of the District Court on or about the 27th day of March, 1908, and that thereafter a motion for a rehearing in the Supreme Court of the Territory of Arizona was filed by these defendants, but said motion was denied.

VI.

Defendants have no information regarding the notice received by this plaintiff from the Governor of the Territory of Arizona, and therefore deny that such notice was received, or that the alleged matter was one in which the Governor was interested officially, or otherwise;

VII.

The defendants on the information and belief deny that on the 24th day of June, 1907, or at any other time, this plaintiff duly paid to Epes Randolph, or to any other person for these defendants in satisfactory of said, or any judgment and interest, the sum of eleven thousand four hundred eighty-four and 95-100 ($11,484.95) dollars, or any other sum, and deny that on said date, or any other time, said sum was due and owing upon said judgment;

12

VIII.

Defendants deny that plaintiff paid for charges and expenses, in consequence of having entered into and executing said bond, the sum of four hundred twenty-six and 75-100 (426.75) dollars, or any other sum;

IX.

Defendants deny that two thousand ($2,000) dollars, or any other sum is a reasonable attorney's fee in this action, or that plaintiff is entitled to any sum on that account;

Further answering the complaint of the plaintiff, defendants allege the facts to be as follows:

I.

That after the judgment was affirmed in the Supreme Court of the Territory of Arizona, and a motion for re-hearing of said cause was denied, a notice of appeal was duly given to the Supreme Court of the United States; that a stay bond for said appeal was duly made and entered into; that said cause was thereafter transferred to the Supreme Court of the United States, and is now pending in said Court; that no execution has ever been issued out of the above entitled Court against these defendants, and in favor of plaintiff, nor was any process or writ of execution on said judgment
13 ever issued by any court at any time; reference is here made to the statutes of the United States with reference to appeals to the Supreme Court of the United States, and the steps incidental thereto, and stays of execution thereunder.

That if the plaintiff in this case has ever paid said sum of eleven thousand, four hundred eighty-four and 95-100 (11,484.95) dollars, it has done so by reason of its own negligence, voluntarily, and not at the request of these defendants, or by any order of Court, or in satisfaction of any judgment.

Wherefore, defendants pray judgment: That they may go hence without delay, and that they may recover their costs in this behalf expended.

FRED W. MORRISON,
H. S. VAN DYKE,
Attorneys for Defendants.

UNITED STATES OF AMERICA,
Southern District of California,
Southern Division,
County of Los Angeles, ss:

A. Sandoval, being duly sworn, deposes and says: that he is one of the defendants in the within entitled action; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those
14 matters, that he believes it to be true.

A. SANDOVAL.

Subscribed and sworn to before me this 25th day of August, 1908.

[SEAL.] BESSIE EATON,
Notary Public in and for the County of Los Angeles, State of California.

Here follows Notice and Motion to suppress depositions of James H. Borland, H. V. D. Johns, and W. S. Alexander and Memorandum of Costs and Disbursements, copies of which are omitted by direction of attorney for appellant.

Here follows a stipulation a copy of which is omitted for the reason a copy thereof appears on page — of this Transcript.

Findings of Fact and Conclusions of Law.

(Title of Court and Cause.)

This cause came on for trial before the above named Court without a jury, a jury trial having been expressly waived by both parties on the 5th day of October, 1908, at the regular term of the above named Court. Eugene S. Ives, Esq., appeared as attorney for the plaintiff and Messrs. [illegible]red W. Morrison, and Lawler, Allen, Van Dyke & Jutten appeared as attorneys for the defendants. Thereupon evidence was introduced by the respective parties and the cause submitted to the Court for decision. The Court having duly considered the evidence, and being fully advised in the premises, finds the following facts:

I.

That all the allegations of the complaint with respect to the residence and corporate character of the parties, and the compliance by the plaintiff with the statutes of this Territory entitling it to transact business within the Territory of Arizona and within the county of Santa Cruz in said Territory are true as therein stated.

II.

That on the 11th day of April, 1907, in an action then pending in this Court in which this Court had jurisdiction of the parties and the subject matter, wherein one Epes Randolph was plaintiff and the above named defendants were defendants, a judgment was duly rendered and entered in favor of said Epes Randolph against these defendants for the sum of $10,528.33 as set forth in said complaint, and that thereafter the defendants in said action appealed from said judgment to the Supreme Court of this Territory.

III.

That in order to procure the plaintiff herein to become surety upon a supersedeas bond to be given upon such appeal, the defendants made a written application to the plaintiff, a copy of which is set forth in the complaint in this action, and thereupon and pur-

suant to said application a bond was executed by the defendants as principals and the plaintiff herein as surety, conditioned as required by law, and thereupon the execution of said judgment was stayed in said appeal.

IV.

That thereafter and on the 24th day of March, 1908, the judgment of the Supreme Court of this Territory was duly ren-
16 dered and entered upon said appeal in all things affirming the judgment of the Court therein appealed from and adjudging and decreeing that the said Epes Randolph do have and recover of and from the defendants herein and the plaintiff as surety upon such appeal bond the full amount of the judgment so appealed from with interest, together with the costs in said Supreme Court.

V.

That thereafter the said defendants filed a motion in said Supreme Court for a re-hearing of said cause, and that said motion was thereafter and on the 16th day of May, 1908, denied by said Supreme Court.

VI.

That thereafter and on the 19th day of June, 1908, the Governor of the Territory of Arizona, at the instance of said Epes Randolph caused a telegram to be sent to the plaintiff, a copy of which telegram is attached to the deposition of Henry D. Lang on file in this case, and thereafter and on the 24th day of June, 1908, the plaintiff did duly pay to the said Epes Randolph in satisfaction of said judgment and interest and costs the sum of $11,484.95, being the full amount thereof, and that upon said date the said sum was due and owing upon said judgment.

17 VII.

That at the time of said payment no appeal, writ of error or supersedeas had been perfected from the judgment of said Supreme Court, and more than thirty days had elapsed since the denial of said motion for a re-hearing and said judgment of said Supreme Court was in full force and effect.

VIII.

That by reason and in consequence of said plaintiff having entered into and executed said bond and in and about the prosecution of this action the plaintiff sustained and incurred the following expenses, costs, charges and expenses, to-wit:

Expenses incurred prior to commencement of suit.....	$676.75
Interest thereon from August 3, 1908, to date.....	9.05
Expenses exclusive of counsel fees.....	300.00
That a reasonable attorney's fee for the attorney of the plaintiff for bringing this action and prosecuting the same to judgment is the sum of.....	2,000.00

Conclusions of Law.

As conclusions of law the Court finds that the plaintiff is
18 entitled to judgment against the defendants and each of them for the amount paid in satisfaction of said judgment, to-wit: the sum of $11,484.95, with interest thereon at the rate of six per cent per annum from the 24th day of June, 1908, to the date of this judgment, and the sum of $985.80 expenses and interest thereon as aforesaid, and the further sum of $2,000 attorney's fees, making a total at the date of this judgment of the sum of $14,683.25, together with the costs of this action.

Let judgment be entered accordingly.

Done in open Court this 20th day of October, 1908.

FLETCHER M. DOAN, *Judge.*

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
Plaintiff,
vs.
A. AND P. SANDOVAL,
Defendants.

Judgment.

19 Be it remembered that the above entitled cause came on regularly for trial on the 5th day of October, 1908, before the Court sitting without a jury, Honorable Fletcher M. Doan presiding. Plaintiff appeared by its attorney, Eugene S. Ives, Esq., and defendants appeared by their attorneys, Fred W. Morrison, Esq., and Messrs. Lawler, Allen, Van Dyke & Jutten. Witnesses were duly sworn on behalf of the plaintiff and on behalf of the defendants and gave their testimony; documentary evidence on behalf of the respective parties was received by the Court, and the evidence being closed, the case was submitted to the Court for its consideration and decision, and the Court, having duly considered the same, and being fully advised in the premises, did, in open court, render its judgment on the 20th day of October, 1908, in favor of the plaintiff and against the defendants for the sum of $14,683.25 and costs.

Wherefore by virtue of the law and the premises aforesaid, it is hereby

Ordered, adjudged and decreed that the plaintiff do recover of defendant the sum of $14,683.25 together with its costs duly taxed at the sum of $118.50, and that the plaintiff do have execution therefor against the defendants and each of them.

20 Done in open Court at Nogales, Arizona, this 20th day of October, 1908.

FLETCHER M. DOAN, *Judge.*

Motion to Set Aside Judgment.

(Title of Court and Cause.)

Come now the defendants in the above entitled action, and move the Court to set aside the judgment rendered in said action on the — day of October, A. D. 1908, and grant a new trial in said cause for the following reasons, to-wit:

1st. That the Judgment is contrary to the evidence;

2nd. That the judgment is contrary to the law;

3rd. That the Court erred in admitting evidence on behalf of the plaintiff over the objection of defendants;

4th. That the Court erred in rejecting evidence offered on behalf of the defendants;

5th. That the evidence is insufficient to sustain the sixth paragraph of the Findings of fact as follows:

"That thereafter and on the 19th day of June, 1908, the Governor of the Territory of Arizona, at the instance of said Epes Randolph caused a telegram to be sent to the plaintiff, a copy of which telegram is atached to the deposition of Henry D. Lang, on
21 file in this case, and thereafter and on the 24th day of June, 1908, the plaintiff did duly pay to the said Epes Randolph in satisfaction of said judgment and interest and costs the sum of $11,484.95, being the full amount thereof, and that upon said date the said sum was due and owing upon said judgment."

6th. That the evidence is insufficient to sustain the 7th paragraph of the Findings of Fact as follows:

"That at the time of said payment no appeal, writ of error or supersedeas had been taken from the judgment of said Supreme Court, and more than thirty days had elapsed since the denial of said motion for a re-hearing and said judgment of said Supreme Court was in full force and effect."

7th. That the evidence is insufficient to sustain that part of paragraph 8 of the Findings of Fact as follows:

"That a reasonable attorney's fee for the attorney of the plaintiff for bringing this action and prosecutiong the same to judgment is the sum of $2,000.00."

Wherefore, defendants pray that said judgment be set aside, and that defendants be granted a new trial herein.

LAWLER, ALLEN, VAN DYKE & JUTTEN,
FRED W. MORRISON,
Attorneys for Defendants.

22 And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause certain Minute Entries of the District Court in words and figures following to-wit:

(Title of Court and Cause.)

MONDAY, *October 5th*, 1908.

Upon motion of Fred W. Morrison of counsel for defendants, it is by the Court,

Ordered that L. W. Jutten, Esq., be and he is now entered as associate counsel for the defendants herein.

Whereupon defendants offered an affidavit for continuance, which said affidavit is by the Court

Ordered filed, and said affidavit for continuance was so filed. Whereupon it was by the Court further

Ordered that the case be and the same is now passed for the present.

(Title of Court and Cause.)

Upon motion of Mr. Fred Morrison, counsel for the defendants, it is by the Court

Ordered that Mr. L. W. Jutten be and he is hereby entered as associate counsel for the defendants.

Whereupon defendants presented an affidavit in support of a motion for continuance of this case until the April term of court, which motion was opposed by plaintiff's counsel, Eugene S. Ives, Esq., and it was by the Court.

23 Ordered that the motion for continuance be and the same is now overruled, whereupon the defendants were granted leave to withdraw their affidavit.

Whereupon defendants offered a motion for suppression of the depositions of James H. Borland, H. V. D. Johns and W. S. Alexander, taken in San Francisco, California, which motion is by the Court

Ordered overruled. Whereupon defendants asked an exception to the ruling.

(Title of Court and Cause.)

This cause having come on regularly at this time for hearing on demurrer, come now the various parties herein, the plaintiff corporation, the United States Fidelity and Guaranty Company, by its counsel, Eugene S. Ives, Esq., and the defendants, A. Sandoval and P. Sandoval, by their counsel, F. W. Morrison and L. W. Jutten, Esqs., and argument is held upon said demurrer. And said argument being now closed, and the Court duly advised in the premises, it is by the Court

Ordered that the demurrer herein be and the same is now overruled, to which order defendants note an exception.

(Title of Court and Cause.)

24 This cause having come at this time regularly for trial, the Court sitting without a jury, come now the respective parties herein, the plaintiffs corporation, the United States Fidelity

and Guaranty Company, by its counsel, Eugene S. Ives, Esq., and the defendants by their counsel, Fred W. Morrison, Esq., and L. W. Jutten, Esq., and both parties answering ready for trial, and the issue being joined, the complaint herein being read by the Court, the trial now proceeds as follows, to-wit:

Plaintiff to maintain upon its part the issues herein submits in evidence a certified copy of the Articles of Incorporation of the United States Fidelity and Guaranty Company of Baltimore, Maryland, and a certificate of authority for said company to do business within the Territory of Arizona, which instruments are ordered admitted in evidence and marked and filed as "Exhibit A." Whereupon

A motion of defendants to strike the certificate of authority to do business within the Territory of Arizona on the ground that there was nothing in evidence to show that J. F. Cleveland, private secretary to the Governor of Arizona, has any authority to execute and sign such certificate.

Whereupon to maintain further upon its part the issues herein the plaintiff offered in evidence a certificate of the Territorial Auditor of the appointment of a resident agent within the Territory of Arizona for the plaintiff corporation, which is by the Court

Ordered admitted in evidence and marked and filed "Exhibit B."

25 Whereupon to maintain further upon its part the issues herein, the plaintiff offers in evidence a certified copy of an appointment of a resident agent of the plaintiff corporation within Santa Cruz county, which instrument is by the Court

Ordered admitted in evidence and marked and filed "Exhibit- C and D." Objections to the admission of said certified copies offered by the defendants being by the Court

Ordered overruled.

Whereupon plaintiff offered in evidence the deposition of J. F. Cleveland, which is by the Court

Ordered admitted and read into the record, in part.

Whereupon the plaintiff to maintain further upon its part the issues herein offered in evidence a copy of the bond of the corporation, which is by the Court

Ordered admitted in evidence and filed as "Exhibit E."

Whereupon plaintiffs to maintain further upon its part the issues herein offers in evidence the deposition of Samuel S. Pattee, which is by the Court

Ordered admitted in evidence and read into the record.

It being now the hour for the noon recess farther trial of this cause is now by the Court

26 Ordered continued until 1:30 P. M. of this day and date, to which hour the bar and officers of the court are now excused.

1:30 p. m.

(Title of Court and Cause.)

Further trial of this cause having been postponed from this morning's session of this October, 1908, term of court, come now the respective parties herein, the plaintiff corporation by its counsel, Eugene S. Ives, Esq., and the defendants by their counsel, Fred W. Morrison and L. W. Jutten, and further trial of this cause now proceeds as follows, to-wit:

Reading into the evidence the remainder of the deposition of J. F. Cleveland with the argument thereon was concluded.

Whereupon, to maintain further upon its part the issues herein the plaintiff's corporation called as a witness Phil Herold, who was by the Court

Ordered sworn, and, being duly sworn, was examined and cross-examined.

Whereupon in order to maintain further upon its part the issues herein the plaintiff corporation offered in evidence the deposition of Richard D. Lang, which was by the Court

Ordered admitted in evidence and read into the record, with certain elisions.

Whereupon to maintain further upon its part the issues
27 herein the plaintiff offered in evidence the deposition of Catesby Thomas, which is by the Court

Ordered admitted in evidence and read into the record.

Whereupon to maintain further upon its part the issues herein the plaintiff calls as a witness Eugene S. Ives Esq., who is by the Court

Ordered sworn, and said witness is duly sworn and examined and cross-examined.

Whereupon the plaintiff to maintain upon its part the issues herein, offered in evidence a certain draft and the endorsement thereon, which said draft and endorsements are by the Court

Ordered admitted in evidence and marked and filed "Exhibit F."

Whereupon to maintain further upon its part the issues herein the plaintiff offered the deposition of James H. Borland, to which objection is offered by the defendants on account of alleged deficiencies in the endorsements upon the envelope, which objection is by the Court

Ordered overruled, and said deposition of James H. Borland is by the Court

Ordered admitted into evidence and read into the record with certain eliminations.

Whereupon to maintain further upon its part the issues herein the plaintiff offered the deposition of H. V. D. Johns, to which objection is made by the defendants on the same ground
28 as the objection to the preceding deposition, which objection is by the Court

Ordered overruled, and said deposition is by the Court

Ordered admitted in evidence and read into the record, in the reading whereof defendants objected to admission in evidence of

certain drafts attached to said deposition, which said objection is by the Court

Ordered overruled and the drafts admitted in evidence.

Whereupon to maintain further upon its part the issues herein, plaintiff offers the deposition of Alfred P. Fuller, which is by the Court

Ordered admitted into the evidence, and with certain eliminations read into the record.

Whereupon to maintain further upon its part the issues herein plaintiff called as a witness Mr. C. D. Galbraith, Esq., who is by the Court

Ordered sworn, he being duly sworn, examined and cross-examined.

Whereupon to maintain further upon its part the issues herein the plaintiff called as a witness Mr. Frank J. Duffy, who is by the Court

Ordered sworn, and being so sworn is duly examined and cross-examined.

During the cross-examination of Mr. C. D. Galbraith the clerk of the court, Mr. Allen T. Bird, not sworn, was questioned with
29 regard to certain facts with regard to persons connected with defendants.

Whereupon the plaintiff rested its case.

Whereupon the defendants to maintain upon their part the issues herein called as a witness Mr. Eugene S. Ives, who is by the Court

Ordered sworn and said witness is duly sworn, examined and cross-examined.

Whereupon to maintain further upon their part the issues herein the defendants offered in evidence the bond (supersedeas bond) given for defendants by the plaintiff corporation in the case of Epes Randolph vs. A. Sandoval and P. Sandoval, to admission of which plaintiff offers objection and said objection is by the Court

Ordered overruled, and the said bond is by the Court

Ordered admitted in evidence, and is marked "Exhibit 1," and so filed.

Whereupon to maintain further upon their part herein defendants offered a certified copy of the record of the Supreme Court of the Territory of Arizona in the case of Epes Randolph vs. A. Sandoval and P. Sandoval, which said record is by the Court

Ordered admitted in evidence and filed as "Exhibit 2."

Whereupon to maintain further upon its part the issues
30 herein the defendants called as a witness Mr. Fred W. Morrison, who is by the Court

Ordered sworn, and being duly sworn, was examined and cross-examined.

Whereupon to elucidate further the point upon which Mr. Morrison has been examined the Court called as a witness and ordered sworn Messrs. W. E. Parker, S. M. Franklin and F. M. Hartman, who were duly sworn, examined and cross-examined.

Whereupon defendants rested.

Whereupon, there being no further testimony offered in behalf of either the plaintiff or the defendant-, and the evidence being closed, by stipulation made and agreed to in open court, it was by the Court

Ordered that the arguments of respective counsel may be submitted on briefs, and that they may have until the 20th day of October, 1908, in which to file such briefs. And in accordance with stipulation it was

Ordered that the court reporter give copy of the record to the counsel herein, and by further stipulation filed herein, time was granted in which to file the said briefs, and judgment is to be rendered as per such stipulation.

(Title of Court and Cause.)

31 Trial of this cause having been heard at an earlier session of this October Term, 1908, of this court, and the evidence herein presented in open court and by stipulation filed herein and made in open court, submitted on briefs by the respective counsel; and the Court being now fully advised in the premises does find for the plaintiff and against the defendant-, and it is by the Court

Ordered that judgment herein be now entered on behalf of plaintiff in the sum of Fourteen Thousand Six Hundred and Eighty-three and 25-100 Dollars, and that the plaintiff have execution therefor against the defendants and each of them.

Whereupon the defendants filed a motion for a new trial and that upon presentation of the same it was by the Court

Ordered that said motion for a new trial be and the same is now overruled and denied. And the defendants thereupon in open court gave notice of appeal to the Supreme Court of the Territory of Arizona from said judgment and from the order denying a new trial herein. Whereupon, on motion of defendants, it was by the Court

Ordered that a stay of execution herein be granted until the 20th day of November, A. D. 1908.

TERRITORY OF ARIZONA,
County of Santa Cruz, ss:

32 I, Allen T. Bird, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Santa Cruz, do hereby certify that the foregoing eight pages of typewritten matter are a full, true and correct copy and the whole thereof, as appearing in the Record of said Court, of the Minute Entries in Case No. 547, wherein the United States Fidelity and Guaranty Company, a corporation, is plaintiff, and A. Sandoval and P. Sandoval are defendants.

In witness whereof I have herewith set my hand and the seal of said Court at my office in Nogales, in the Territory and County aforesaid, this 20th day of October, A. D. 1908.

[SEAL.]

ALLEN T. BIRD,
Clerk of said Court.

And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court, in said entitled cause a certain Reporter's Transcript of Testimony in words and figures following, to-wit:

Official Reporter's Transcript.

Before said cause came on for trial, and on the 5th day of October, A. D. 1908, the following proceedings were had therein, to-wit:

Mr. JUTTEN: We will move the Court to suppress the deposition of James H. Borland, H. V. D. Johns and W. S. Alexander, taken in the case of the United States Fidelity and Guaranty Company against A. and P. Sandoval, for the reason that they have not complied with section 2520, which provides that if the depositions are sent by mail, the postmaster, or his deputy, mailing the same
33 shall endorse thereon that he received them from the hands of the officer before whom they were taken. Now, I submit to the Court that this package, this envelope reads in blank: "Received this package this — day of —— from the hands of —— ——, the officer before whom the enclosed deposition was taken, and forwarded by due course of mail as directed. —— ——, Postmaster at S. F., Cal., by A. Aldredge, Registry Clerk, Deputy, 9-30-08." Now, on the grounds that that has not complied with the statute, we move to suppress that deposition.

Mr. IVES: We object to the motion to suppress. The deposition is taken under a stipulation, and no commission was issued, and the stipulation reads: "It is hereby stipulated by and between the parties hereto that the depositions of" and mentions this one among other, "may be taken without commission before any notary public in any county or state where any such witnesses may respectively be found, and that the attached interrogatories to be propounded to each of said witnesses respectively and the answers of each of said witnesses thereto and any of the cross interrogatories that may be prepared by the attorneys for the defendants, and the answers of each of said witnesses to said cross interrogatories so prepared, may be read in evidence upon the trial of the above entitled action the same as if commissions had been duly issued out of the above named Court,
34 subject to any and all other objections, and the interrogatories and answers, and cross interrogatories and answers, shall be subject to the same objections, except as to the form of the question, as if the witnesses were personally present and testified." Now, we claim that that stipulation entirely goes beneath the provisions of the statute.

Mr. JUTTEN: Mr. Ives, the depositions are subject to any and all objections except as to the form of the question.

Mr. IVES: As if the witness were personally present and testified, but not this technical objection that the postmaster failed to name the office from which he received them.

The COURT: I don't think that the objection to its form is good. I find that on the back of the envelope a certificate of the officer "I hereby certify that I am the officer before whom the enclosed depo-

sitions were taken, and I in person deposit this envelope containing said depositions in the mail for transmission on this 30th day of September, 1908, at the P. O. at San Francisco Post Office S. F. California, J. C. Cleveland."

Now, I find there, "Received this package this — day of —— from the hands of —— ——, the officer before whom the enclosed deposition was taken, and forwarded by due course of mail as directed. —— ——, Postmaster at S. F., Cal. By A. Allridge, Reg. Clerk, Deputy, 9-30-08." It is true that he has not placed on
35 the back of the envelope the name of the officer, but he certified that he received it from the officer before whom the enclosed deposition was taken, and he has not placed on the back of the envelope the name of the postmaster at San Francisco, but he has signed it "Postmaster at San Francisco, by A. Allridge, Register Clerk, Deputy," and he has given the date of its reception besides his name instead of putting it four lines above. As a clerical proposition, he would be subject to criticism by his superiors, but as a legal proposition the certificate certifying meets the gist of the requirement of our statute in which it says that it was sent by mail. The objection will be overruled.

Mr. MORRISON: Exception.

The envelope in which said depositions were received is in the words and figures following:

Front Side—

Fee for taking deposition, $8.40. This package is opened the 5th day of Oct. 1908, at the request of Fred W. Morrison, attorney for the defendant. Allen T. Bird, Clerk District Court, — County. By —— ——, Deputy. From M. J. Cleveland, 2619 Pacific Avenue. Notary Public in and for the City and Co. of San Francisco, officer before whom the enclosed depositions were taken.

To the Clerk of the District Court, Santa Cruz County, Nogales, Arizona."

36 Back Side—

No. 547. In the District Court, Santa Cruz County, Arizona. United Stataes Fidelity and Guaranty Company, a corporation, vs. A. and P. Sandoval. Deposition of James H. Borland, H. V. D. Johns, W. S. Alexander. Witnesses.

I hereby certify that I am the person before whom the enclosed depositions were taken, and I in person deposit this envelope containing said depositions in the mail for transmission, on this 30th day of September, 1908, at the post office of San Francisco, Post Office S. F. California. M. J. Cleveland.

Received this package from the post office at Nogales, Ariz., on the 5th day of October, 1908, and filed same on the 5th day of Oct., A. D. 1908. Allen T. Bird, Clerk District Court, Santa Cruz County. By —— ——, Deputy.

Received this package this — day of —— from the hands of —— ——, the officer before whom the enclosed deposition was taken and forwarded by due course of mail as directed. —— ——, Postmaster at S. F., Cal. By A. Allridge, Reg. Clk. Deputy. 9-30-08."

NOGALES, ARIZONA, MONDAY, *October* 5, 1908.

Mr. JUTTEN: We would like an order of Court showing that with the understanding of counsel, that the Complaint and Answer
37 as now filed, and as corrected, will stand as the Complaint and Answer in this action.

The COURT: That is, that the Complaint and Answer as they now read?

Mr. JUTTEN: Yes, sir.

The COURT: The Complaint and Answer on which the case is tried will be considered the same Complaint and Answer as was filed?

Mr. JUTTEN: Yes, sir.

The COURT: The demurrer to the Complaint is overruled.

Mr. MORRISON: Note an exception.

Mr. IVES: I first present in evidence a stipulation, it is stipulated that the plaintiff has been regularly incorporated, as denied in the Answer.

The COURT: Yes.

Mr. IVES: Now, we offer in evidence a certified copy of the Articles of Incorporation, and the license of the Governor permitting the Surety Company to do business.

The COURT: Very well.

Mr. MORRISON: Now, we object to this, for the reason that this certificate is supposed to have been signed by J. F. Cleveland, who signs himself as "Private Secretary to the Governor." We do not think it is within the province of the Court to take judicial
38 notice that he is the Private Secretary to the Governor. And even though he is the Private Secretary to the Governor, if that were admitted for the sake of argument, we do not think he would have a right to certify to papers that are on file in the office of the Governor.

Mr. IVES: Here is the deposition of Mr. Cleveland to the effect that he is the custodian of all the papers in his office. Paragraph 2541 says that the person who has possession of the papers shall certify to them.

Mr. MORRISON: Well, we have not had a chance as yet to object to the introduction of the deposition of Mr. Cleveland, and we do not feel at this time that it is proper. It is supposed to be under seal.

Mr. IVES: The Court will take notice of the fact that the Private Secretary has no seal.

Mr. JUTTEN: It does not appear in this case that there is a public officer, to-wit: The Private Secretary to the Governor of Arizona, or a Secretary that is empowered by statute or any legislative act to keep control of the archives of the Governor, or keep certificates or certify to papers.

Mr. MORRISON: And I want the further objection to this, and that is: That the certificate here made by Mr. Cleveland is to this effect, that "I hereby certify that the above is a true, full and complete copy of the certificate of authority of the Governor of Arizona to
39 the United States Fidelity and Guaranty Company for the transaction of business in the Territory of Arizona, as it appears on file in the office of the Governor." Now, the "above" is this:

"October 15, 1903. To Whom It May Concern: This is to certify that the United States Fidelity and Guaranty Company, of Baltimore, Maryland, has complied with the provisions of the laws of the Territory of Arizona relative to surety companies, and that the said company is authorized to transact business in Arizona." Now, under that certificate, they are also attempting to introduce the Articles of Incorporation of this surety company. There is nothing here to show that they were ever filed. He certifies that the Governor says they are authorized to do business here.

Mr. JUTTEN: The substance of that certificate seems to be this: That in 1903 the Governor of Arizona made a certificate that this company was authorized to do business in the Territory of Arizona. Now, some person has simply certified that he made a certificate at such a time as that. There is no certificate that they ever complied with the statute. There is no evidence that the Private Secretary is a private official, or that the Governor or anybody acting for the Governor has issued a certificate, and the certificate that is made does not refer to the Articles of Incorporation or anything else, and yet they attempt to put the evidence in under that.

40 The COURT: What is the purpose of this offer?

Mr. IVES: I avow that the Private Secretary is the proper custodian of all these papers, and he says so by his deposition. The statute with respect to surety companies, Chapter 8, Paragraph 415, page 196, is as follows: "That every company, before transacting any business under this act, shall deposit with the Governor of the Territory an authenticated copy of its charter or articles of incorporation, and a statement, signed and sworn to by its president and secretary, showing its assets and liabilities. If the said Governor shall be satisfied that the said company has authority under its charter or articles of incorporation to do the business provided for in this act and that it has a paid up capital or not less than one one hundred thousand dollars, in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this act." We will withdraw this offer now, and I offer the deposition of Mr. Cleveland under the stipulation, the same as the one I read.

The deposition of J. F. Cleveland is now read to the Court.

Interrogatory 2. "State what official position you hold in the Territory of Arizona, and how long you have held the same?"

Mr. MORRISON: Now, we object to the Interrogatory number

41 2 for the reason that the Private Secretary to the Governor is not shown under the statute to be an official position, and he answers that question—he asks him what official position, if any, he occupies, and he says, "I am private secretary to the Governor." We move to strike out that answer on the ground that the answer—that he answers he is private secretary to the Governor, and the statute does not provide for such an office. We ask that it be struck out on the ground that it is incompetent, irrelevant and immaterial.

The COURT: The objection will be overruled.

Mr. JUTTEN: We will take an exception to the ruling of the Court.

(Interrogatories No. 1, 2 and 3 read, and the answers thereto.)

Mr. IVES: Now, I offer the document. (Articles of Incorporation.)

Mr. JUTTEN: We would like a motion of record to strike out the last—the answer to the last question (Interrogatory No. 3) on the same ground.

The COURT: Motion denied.

Mr. IVES: Now, we offer in evidence the Articles of Incorporation.

Mr. MORRISON: We renew our objection.

42 The COURT: On what grounds?

Mr. MORRISON: On the ground that it does not show that Mr. Cleveland is either a public officer or a deputy. We object to it on the ground that it has not been shown that the private secretary to the Governor is a public officer and the lawful possessor of any public records. He says in his deposition that he is the custodian of all records. And for the further reason that the certificate of the private secretary is not sufficient to entitle it to admission in evidence.

Mr. JUTTEN: And that it must be given under the Governor's hand, and also the further objection that no evidence has been introduced that this is the signature of Mr. Cleveland, assuming that Mr. Cleveland did have the authority to make the certificate.

Mr. IVES: I have nothing to say in reply to that.

Mr. MORRISON: We don't think the certificate is sufficient.

The COURT: Objection overruled.

Mr. MORRISON: Exception.

(Said paper was marked "Exhibit A," and introduced in evidence, and is with the papers in this cause.)

Mr. IVES: I now offer in evidence the certificate of the Auditor of the Territory with respect to the appointment of an agent by the United States Fidelity and Guaranty Company.

43 Mr. JUTTEN: There is no objection to that, Your Honor. We admit that that is the proper way.

(Said paper was marked "Exhibit B," and introduced in evidence, and is with the papers in this cause.)

Mr. IVES: I now offer in evidence a certified copy of the appointment of an agent, filed in the office of the Recorder of Santa Cruz County. Any objection to this?

Mr. MORRISON: I want to object to this power of attorney in the appointment of an agent, for the reason that the statute says—We object to this, if Your Honor please, for the reason that this appointment of an agent does not show that John J. Sweeney is a citizen of the Territory of Arizona. It shows that he is a resident of Phœnix. We do not know that he is a citizen of the Territory of Arizona, and the statute further says that the corporation doing business in this Territory shall appoint an agent who has been a bona fide resident of the Territory for at least three years. If that be true, there is nothing to show under this appointment whether he was a resident or not.

The COURT: I will overrule the objection.

Mr. MORRISON: I will withdraw the objection.

Mr. IVES: There are two of these appointments, and are just alike, and I will introduce both of them.

44 (Said papers were marked "Exhibit C" and "Exhibit D," and introduced in evidence, and are with the files of this cause.)

Mr. IVES: I now offer in evidence a copy of the supersedeas bond on appeal.

Mr. MORRISON: I want to object to the Exhibits C and D, for the reason that one of these introducements is not certified to by the Secretary of the Territory.

Mr. IVES: The law requires them to file a copy of the appointment of their agent with the County Recorder. The law also requires them to file the appointment of their agent with the Secretary. They have done that and I have put it in evidence. Now, they apparently got a certified copy of the appointment of the agent from the Secretary's office and filed that, and then thinking that perhaps that was not the requirement of the statute, they again filed the appointment. I don't know that both are necessary, but certainly neither can hurt.

The COURT: Objection overruled.

Mr. IVES: Any objection to this supersedeas bond?

Mr. MORRISON: No, sir.

(Said paper was marked "Exhibit E," and was admitted in evidence, and is with the papers in this cause.)

45 Mr. IVES: Now, the application for the supersedeas bond to this company is admitted in the answer. The fact of the judgment in Santa Cruz County in favor of Randolph against A. and P. Sandoval is admitted?

Mr. MORRISON: Yes, sir.

Mr. IVES: The fact of the appeal to the Supreme Court of the Territory is admitted in the answer, and this is the supersedeas bond, and is it also admitted that that suit was affirmed, and the motion for a rehearing was denied on the 16th day of May. I understand that that is an error, and should be the 19th of May. Therefore it is stipulated that the motion for a rehearing was denied on the 19th of May?

Mr. MORRISON: Yes.

Mr. IVES: I will now continue the deposition of Mr. Cleveland.

The COURT: Very well.

Interrogatory No. 5. If your answer to the last preceding interrogatory be in the affirmative, state whether or not said Pattee was at the office of the Governor on the 19th of June, 1908?

Mr. MORRISON: We object to that as incompetent irrelevant and immaterial whether he was in the Governor's office or not.

Mr. IVES: It is preliminary.

The COURT: I suppose it is preliminary.

46 Interrogatory No. 6. If your answer to the last preceding interrogatory be in the affirmative, state whether or not at the time the Governor of said Territory wrote or caused to be written a telegram addressed to the United States Fidelity and Guaranty Company of Baltimore, Maryland?

Mr. MORRISON: Now, we object to that for the reason that it is

secondary evidence whether he wrote a telegram. There is no testimony that he knew the Governor or had any knowledge from the Governor that he did write such a telegram.

Mr. JUTTEN: We object to it because it is incompetent, immaterial and irrelevant whether the Governor wrote the telegram or not.

The COURT: I don't know about that. I will rule on that when I hear enough about the case to know whether it was material. There is nothing about it yet that is material. I suppose there will be testimony that comes after that will make it material.

Mr. JUTTEN: We object to the question on the ground of the improper method of proof. It is a question of evidence largely. We object and think that this is an improper question itself, and an improper way to get at an act of the Governor.

The COURT: The objection will be overruled.

47 Interrogatory No. 7. If your answer to the last preceding interrogatory be in the affirmative, state whether or not you have such telegram or copy thereof among the files in the office of said Governor; and, if so, attach such telegram or a copy thereof to this deposition.

Answer. Yes; there is a copy of such telegram among the files in the office of the Governor, and the following is a true copy thereof:

"PHOENIX, ARIZONA, *June* 19, 1908.

The United States Fidelity and Guaranty Co., Baltimore, Md.

Informal complaint has been lodged with me that Epes Randolph obtained judgment in Supreme Court of the Territory against you on appeal bond in case of Randolph versus Sandoval on twenty-seventh March last for ten thousand and some odd dollars and costs. That demand has been made on you for payment. That there has been no stay of judgment or steps to appeal from it. That you ignore his demand. Do you care to advise me of the reason?

JOSEPH H. KIBBEY,
Governor of Arizona."

Mr. MORRISON: We object to that for the reason that the telegram itself would be the best evidence, and this is merely a copy of a telegram.

48 Mr. IVES: Well, the next question settles that. The telegram is sent to Baltimore, Maryland, and the next question and answer settles that.

The COURT: Very well.

Interrogatory No. 8. State if you know whether such telegram was delivered for transmission to the Western Union Telegraph Company; and, if so, who delivered the same to said company or any of its agents for that purpose?

Answer: A copy of the said telegram was delivered for transmission to the Western Union Telegraph Company at its local office by me, at the request of the Governor of Arizona.

Mr. JUTTEN: We object to that; we believe there is a presumption

of law in a case of mailing a letter, depositing it in the post office that in the due course of mail it will be received, but there is no presumption, however, in a case of a telegraph company that when a telegram was given to it that it was ever received by the parties.

The COURT: In other words, in order to offer secondary evidence, they have to show that it was out of their possession?

Mr. JUTTEN: We submit that they have not shown their inability to procure the original.

Interrogatory No. 9. "State whether or not, if you know,
49 an answer was received to said telegram?"

Mr. MORRISON: We object to that question, "State whether an answer was received."

The COURT: Objection overruled.

Interrogatory No. 10. If your answer to the last interrogatory be in the affirmative, state whether or not you have a copy of said telegram, or the telegram that was delivered at the office of the company; and if so, annex the same or a copy thereof to this deposition?

Mr. JUTTEN: We object to any copy of any telegram, until they prove they can't produce the original.

Mr. IVES: It is in the Governor's office, and this is the Governor's secretary testifying.

Mr. MORRISON: It is true, but you have not shown you can't produce it.

The COURT: The objection is that there has not been any showing that you could not produce the original?

Mr. MORRISON: Yes, sir.

The COURT: I don't know whether you have the original there or not. The ordinary rule of evidence is that the original must be presented to the attorneys, and in order to authorize the introduction of a copy, there must be some showing made that you are unable to procure the original.

50 Mr. IVES: The evidence is that it was received by the Governor in reply to an official communication, and this is the evidence of the Governor's secretary.

Mr. MORRISON: Now, we would like to state one thing in support of our objection. The statute says that certified copies of public records shall be introduced where the originals cannot be procured, and our objection a while ago to certified copies of certain public records were admitted. Now, these certainly are not certified copies.

Mr. IVES: I think it is stronger than certified copies. It is under oath.

The COURT: Technically, the objection is good. In fact, it shows that copies of the records of public officers certified to shall be admitted as evidence in all cases where the records themselves cannot be produced. Technically that objection is good, and this is the deposition of an officer to the contents of a paper that is on file in the public office. He is not giving a certified copy; he is giving his deposition in reference to it, and it will not be admitted—this testimony relative to the contents will not be admitted unless there is a showing

made that the original is a part of the files and cannot be produced, and upon that being made, this will be admissible.

Mr. IVES: An answer was received to the telegram that they sent, is admitted.

The COURT: And the contents will be admitted on the
51 showing that it is there, and cannot be produced.

Answer: "An answer was received."

Mr. MORRISON: We object to the answer that there was an answer received; it is a conclusion of the witness that there was an answer received. The answer itself is the best evidence, or a certified copy. Now, Mr. Ives is attempting to read there a telegram that was sent to the Governor—an answer that was received, and he has made no showing that he could not produce the original, or have it certified to as a public document.

Mr. JUTTEN: The objection is on the further ground that the telegram was never received.

The hour of twelve o'clock, noon, having arrived, the further hearing of this cause was continued until 1:30 this afternoon.

NOGALES, ARIZONA,
MONDAY, *October* 5, 1908—1:30 o'clock p. m.

Mr. JUTTEN: In reading over the record, I think this motion is proper at this time. There has been a request for a ruling of the Court on the question of the admissibility of the contents of the telegram alleged to have been sent on behalf of the Governor to the plaintiff at Baltimore. Now, there is nothing in the record showing that it was ruled on.

Mr. IVES: My point is that the evidence of Mr. Cleveland is
52 that the original telegram was delivered by him to the Western Union officials in Phœnix, and it is in their possession now, and therefore the original is out of the jurisdiction of this Court.

The COURT: I don't think you understand the point made by counsel. Your question was in regard to a telegram——

Mr. IVES: Sent to Maryland, sent to the company at Baltimore.

The COURT: Yes.

Mr. IVES: Now, the one he delivered to the telegraph company was the original.

The COURT: Yes.

Mr. IVES: And that is beyond the jurisdiction of this Court.

The COURT: Now, you ask this witness this question, "If your answer"—you asked him before that whether he caused a telegram to be written, a telegram addressed to the company, and he says he did. And then you ask him, "State whether or not you have such telegram or a copy thereof among the files in your office, and if so, attach such telegram or a copy thereof to this deposition." Now, instead of attaching a copy and referring to it, he testifies "yes, there is a copy of such telegram among the files in the office of the Governor, and the following is a true copy thereof," and then he gives the con-

tents of it. Now, the objection made by the opposing counsel
53 is to his giving in his answer to this question the contents of a written instrument, your stipulation being that there interrogatories shall be propounded to and he shall answer them, and the answers and interrogatories shall be subject to the same objections, except as to the form of the question, as if the witness were personally present and testified. Now, if Mr. Cleveland were personally present and testified in this case, you had him upon the witness stand and asked him the contents of a written instrument and they objected to it, would he be allowed to sit there and testify as to the contents of a written instrument, that is the question.

Mr. IVES: What I say is this: The fact that Mr. Cleveland may confuse an original with a copy does not alter the fact that the original telegram was the one he handed to the operator in Phœnix, and therefore the proof is that the original is not in the possession of the witness and is beyond the jurisdiction of the Court. Now, therefore, that lays the foundations for the proof of its contents by secondary evidence. Now, that is his proof, and I claim that we are not bound to produce the copy of the original, and that he can testify to its contents.

The COURT: Very well. Now, they want you to make a showing before you are entitled to that ruling to the fact that the original cannot be procured.

54 Mr. IVES: I think that if you will read the following question and answer, I submit that that is such proof that the original was deposited by him in the Western Union Telegraph Company's office in Phœnix, and that office not being in the jurisdiction of this Court, it is impossible to get that here. The fact that he left the original there raises the presumption that it is still there, and that lays the foundation for the secondary evidence as the law requires. That don't apply to the answer, because they have the original answer, and I think another question arises.

Mr. JUTTEN: In this way, no foundation has been laid, and further, under that stipulation, we don't think that the plaintiff can cure any defects by subsequent questions and answers. I would like to call Your Honor's attention to the fact that the copy of the telegram was sent.

Mr. MORRISON: And the witness states that the telegram was in the files of the office of the Governor, and Mr. Ives has attempted to prove that he was the custodian of the files. If he has that telegram there, he can't prove it in that way.

The COURT: Yes, I see that oversight. Paragraph 2541 allows you to prove any files in a public office.

Mr. IVES: I think that statute refers to records; I don't think that refers to correspondence.

55 The COURT: Well, this paper was filed. It looks very much like the same. Mr. Cleveland certifies, or rather testifies, he says, "Yes, there is a copy of such a telegram among the files in the office of the Governor, and the following is a true copy thereof," and then he sets it out, and then goes on and answers the other question, and then he subscribed himself, and swears to it be-

fore a notary. Now, instead of doing that, instead of when you asked him to attach a copy of it, he would have attached it to this deposition as he should have done, and certified it by saying: I, J. F. Cleveland, private secretary to the Governor, certify that the above is a true copy of the telegram referred to in my answer number so and so to the attached deposition, and that the same is on file in the Governor's office, and signed it "J. F. Cleveland, private secretary," you would have had a certified copy, and while this is practically the same thing, it is not technically the same.

Mr. IVES: Now, that is not a record. Here is the statute: "Copies of the records of all public officers, Courts, etc., shall be admitted in evidence in all cases where the records themselves would be admissible." I claim that this copy in the Governor's office was not a record; it was a copy of the original telegram filed with the Western Union Telegraph Company.

Mr. JUTTEN: In answer to that, the statute requires that a foreign corporation file a copy of their articles of incorporation, and
56 he can certify to that copy that is on file; that is the record that is on file.

Mr. IVES: Now, I will state further in reply to the question asked me about attaching it. That is simply a matter of form, and I think that is covered by the stipulation as to the form.

Mr. MORRISON: It would certainly be objectionable if he were here and testified.

Mr. IVES: This telegram is not in the Governor's office, it is in the office of the Western Union Telegraph Company.

The COURT: It occurs to me that if the testimony could be given upon the showing that it was not in the jurisdiction of this Court, then it would be competent.

Mr. IVES: Under what fact?

The COURT: The showing here that the copy of the telegram referred to in this deposition is on file in the Governor's office in Phœnix, and not in the jurisdiction of this Court. He does not state that it is beyond the jurisdiction of this Court, or it does not state that it could not be here. That deposition does not cover the ground that could be covered by the witness if such statements were fairly made.

Mr. IVES: Could Your Honor indicate?

The COURT: I have said that the manner in which that character of testimony would be admitted would be on a showing that
57 the original telegram or the copy, whichever is referred to there, is on file in the Governor's office, out of the jurisdiction of this Court, and cannot be procured.

Mr. IVES: Does Your Honor want proof that the Governor's office is in Phœnix?

The COURT: Yes.

Mr. IVES: I will ask that the telegram be admitted subject to my proving that.

The COURT: I will reserve my ruling on it until that is proven.

Mr. IVES: I will call Mr. Herold.

PHILIP HEROLD, a witness on behalf of plaintiff, testified that he knew J. J. Sweeney; that said Sweeney resided in Phœnix, and that at present he is assistant cashier of National Bank of Arizona in Phœnix, A. T.

Witness excused.

Mr. IVES: Now, may it please the Court, I make the statement that we cannot procure the files of the office of the Governor or copies of this correspondence, the actual files here on this trial, and I again offer the question and answer of the witness, Mr. Cleveland, which Your Honor reserved the ruling on.

Mr. JUTTEN: I believe that correspondence by the Governor can be secured by this private secretary and, in addition, we object in addition to each and every ground that the proper method
58 of proof of documents relating to the official files of the Governor which necessarily comprise the records of the Governor's office is pursuant to provisions of the statute in such cases made and provided, and that has not been done in this instance. That the same evidence must be shown by the introduction of the record itself or by certified copy of it in accordance with the terms of the statute, and that in addition to each and every other objection moreover, I think that the deposition of the manager of the telegraph company should be taken in this case. I know that telegraph companies do destroy their originals after a certain time, but I think the deposition of that man could be taken, and the original telegram could be had.

The COURT: I don't think that that last objection would have any weight in this case, because they have not proved or attempted to prove that the message was received or was sent, but they have proved or attempted to prove that the private secretary of the Governor, at the Governor's instruction, delivered a message to be sent, and he testified to the contents of it, so that I don't see that the deposition of the telegraph operator that he received a cerain message from the Governor's private secretary would be any better than the deposition of the Governor's secretary that he delivered to that operator a certain message.

Mr. JUTTEN: I think that the objection that we made to
59 the evidence that sufficient foundation for such question and answer is good. We must assume that if the witness were personally here and testified that that evidence would be allowed to be given.

The COURT: He could not be permitted to testify to the contents of a written instrument unless it was shown that that instrument could not be produced here?

Mr. JUTTEN: Yes, sir.

The COURT: And you base your objection upon the ground that it is your theory that the Governor would not permit the files of his office to be sent to this or any other point to be used in a law suit, and for that reason certified copies should have been secured?

Mr. JUTTEN: For instance, if I was presenting this case, I would have had the private secretary of the Governor on the stand, and I

would say to him "you are the custodian of these records?" and on his answering that he was, I would say "what are they," and thereupon they could be read in evidence or copies substituted, but in the absence of their being present, there would at least have to be a certified copy in accordance with the statute.

The COURT: And if he were here and would testify that he did not have the records here from the Governor's office; that the Governor did not permit them to be taken out of the office and carried about, then he would be permitted to offer secondary evidence as to their contents?

60 Mr. JUTTEN: Yes, sir, presumably, such secondary testimony as indicated by the statute.

The COURT: Well, that brings us back to the question I asked you before. The inability to procure that has been testified to by Mr. Ives. You are not inclined to do so?

Mr. JUTTEN: No, sir.

Mr. IVES: I will supply that proof later. I will take the stand, if necessary, myself later.

Mr. IVES: Now I read the deposition of Mr. Lang.

Interrogatory No. 2: "State whether your company received any letters or telegrams with respect to or relating to the judgment obtained by one Epes Randolph against A. and P. Sandoval and the United States Fidelity and Guaranty Company, or the payment thereof, from the Governor of the Territory of Arizona, or his private secretary, or any one connected with his office?"

Mr. MORRISON: We object to that, if Your Honor please; it is absolutely immaterial, irrelevant and incompetent, and for the further reason that any letter from Mr. Epes Randolph is not binding in any way in this case. No, I beg your pardon. It says from the Governor. There has been no proper foundation made for that question for the reason that the witness has not testified

61 that he knows the Governor or his signature, or that he knows that this letter was received from the Governor, and for the further reason he is asked if he has received any letter or telegram from the Governor or the private secretary, or any one connected with his office, and before that answer is read we wish that objection, if Your Honor please.

Mr. JUTTEN: We want to object to that question further for the reason that this witness has never testified that he has received himself any telegrams or letters or has ever seen any that has been received from the Governor, the private secretary or any one else in his office, and any telegram or letter might have been received by the company and might be received by some other officer, and might be hearsay on his part; we don't know whether it has been received or not. There is no foundation laid for that.

The COURT: You may read me the question over again mister counsel, or I will read them a little more carefully than I did before.

Mr. MORRISON: And we object for the further reason that no such telegram was ever received—was ever sent by the Governor or private secretary or any one in connection with that office.

(Interrogatory No. 2 and answer thereto read.)

The COURT: That is the question and answer objected to?

62 Mr. MORRISON: Yes, sir.

The COURT: Objection overruled.

Mr. MORRISON: Note an exception.

Interrogatory No. 3: If you answer "yes" to the last question, please produce such original letters or telegrams and attach same to this deposition.

Answer: I now produce as a part of my deposition in the above entitled cause original telegram dated Phœnix, Arizona, June 19th, 1908, addressed by Joseph H. Kibbey, Governor of Arizona, to the United States Fidelity and Guaranty Company at Baltimore, Maryland, marked Exhibit R. D. L. No. 1.

I also file herewith a communication dated Phœnix, Arizona, June 19th, 1908, addressed to the United States Fidelity and Guaranty Company and signed J. F. Cleveland, Private Secretary, marked Exhibit R. D. L. No. 2.

I also produce and file herewith communication signed by J. F. Cleveland, private secretary, containing acknowledgment of the telegram addressed to the Governor of Arizona, marked Exhibit R. D. L. No. 3.

Mr. MORRISON: Now, we wish to renew our objections made to this same question and answer that we made to the former question.

Mr. JUTTEN: There has been no testimony in any way to show that there was a telegram sent by the Governor or anybody else connected with his office.

63 The COURT: Objection overruled.

Mr. MORRISON: Note an exception.

Mr. IVES: Then I will read the exhibits attached to the answer.

No. 3: "Hon. Joseph H. Kibbey, Governor, Phœnix, Arizona. Your wire regarding Randolph v. Sandoval received. Writing you fully today."

Mr. MORRISON: We move that that part of the answer be stricken out, for the reason that it is not responsive to the question.

The COURT: Your objection is to Exhibit 3?

Mr. MORRISON: That last that they sent to the Governor: that question does not call for any papers that they may have sent.

Mr. IVES: I don't care anything about it. I consent that the answer be stricken out.

The COURT: I don't see anything to call for it.

Mr. IVES: I consent that the answer be stricken out.

The COURT: The objection will be sustained to the last part as not being responsive to the question.

Mr. IVES: I now read the deposition of Mr. Catesby C. Thom.

Interrogatory No. 3: "State whether or not on or before

64 the 24th day of June, 1908, you signed a draft upon the United States Fidelity and Guaranty Company for the sum of eleven thousand, four hundred and eighty-four dollars and some cents, or for an amount about that sum?"

Mr. MORRISON: We object, if the Court please, as being incom-

petent, immaterial and irrelevant, and as having no connection in any way with this case; he might have signed any draft, and we further object to it because it is indefinite, and says "for an amount about that amount" and does not specify what draft, and does not particularize in any way, and does not name the person on whom the draft was made, and so it does not bind us or have any connection with this case that we can see in any way.

Mr. IVES: That one question does not prove the whole thing.

Mr. MORRISON: Or that he drew the draft in favor of the United States Fidelity and Guaranty Company, or that he drew the draft on them or for them.

Mr. IVES: He says that he represented them. We will avow that he will prove that. We can't ask one question in one deposition and then lay it aside and prove another.

Mr. MORRISON: He won't say in whose favor the draft was drawn, or that he had the proper authority.

Mr. IVES: I will avow that we will produce the original draft before we get through.

65 The COURT: You will?

Mr. IVES: Yes, sir.

The COURT: All right; upon that avowal I will overrule the motion.

Interrogatory No. 4: "State whether or not, on or before such date, you either individually or as a representative of Frank M. Kelsey, or any other person, signed a draft to the order of Epes Randolph?"

Mr. MORRISON: We object to that, if the Court please, because he is now testifying that he signed a draft individually or as a representative of Frank M. Kelsey, and we do not know who Mr. Kelsey is. There has been no testimony as to who he is, and there has been no testimony to show that he was the agent or had authority, for the company or the Metropolitan company for whom Mr. Thoms worked had authority, or that it has any connection with this case that he signed the draft for Mr. Randolph.

Mr. IVES: Now, the answer cuts out Kelsey. In answer to the question he says "I did as representative of the United States Fidelity and Guaranty Company."

Mr. MORRISON: Now, we move that the answer be stricken out for the reason that it is not responsive to the question. He asks him "Did you sign it individually or as the representative of Frank M. Kelsey."

66 Mr. IVES: "Or any other person;" I framed my interrogatory to cover it.

The COURT: The objection is overruled.

Mr. MORRISON: Exception.

Interrogatory No. 5: "If your answer is 'yes' to the foregoing interrogatory, state to whom you delivered said draft?"

Answer: "To Eugene S. Ives, as attorney for Epes Randolph."

Mr. MORRISON: We object to that because that is a conclusion of the witness as to whether he was attorney for Mr. Randolph or not.

The COURT: He didn't say he delivered it to him.

Mr. IVES: Now, I will offer in evidence the original draft as attached to the deposition.

Mr. MORRISON: By that, do you include any endorsements thereon?

Mr. IVES: I will prove the endorsements. I will be sworn and prove the endorsements right now.

E. S. IVES, being sworn as a witness on behalf of the plaintiff, testified as follows:

On the 24th day of June, 1908, Catesby C. Thom, in the City of Los Angeles, delivered to me the draft which is attached to Catesby C. Thom's deposition. I thereupon, by authority of Epes Randolph, endorsed his name, wrote upon the back of said draft the fol-
67 lowing: "Epes Randolph, per Eugene S. Ives, attorney in fact." That thereupon I wrote upon the back of the same: "For deposit, Eugene S. Ives." At such time I had an account with the Metropolitan Bank and Trust Company of Los Angeles, and had it for a year or more prior thereto, and I thereupon deposited such draft to my personal account in the Metropolitan Bank and Trust Company in the City of Los Angeles. I had authority to sign Mr. Randolph's name as attorney in fact.

Cross-examination by Mr. JUTTEN:

Q. What was the meaning of the attorney in fact?

A. Attorney in fact to receive the money, and to endorse any check that might be made to his order.

Q. Was the authority in writing?

A. No sir, oral.

Q. Did he expressly authorize you to that effect?

A. Yes.

Q. In writing?

A. No sir; I have held powers of attorney from him at different times in writing, but none with respect to this.

The WITNESS: I, as attorney for Mr. Randolph, endorsed the draft in blank and delivered it to myself individually.

The COURT: And then without endorsement you deposited it?

68 A. Yes, endorsed it to my credit, where the money remained to my personal check.

Mr. IVES: I now offer in evidence the draft and the endorsement.

The draft attached to the deposition of the witness Catesby C. Thom was now marked "Exhibit F," and admitted in evidence.

Mr. IVES: I now read the deposition of Mr. James H. Borland.

Mr. MORRISON: I would like this envelope to go in too, the one in regard to which I made the motion to suppress the deposition.

Mr. JUTTEN: We will have an objection noted to the introduction of the deposition.

The COURT: Yes; let it go in; the objection will be overruled.

Answer to Interrogatory No. 5: "Upon receipt of telegram from the home office, from the company, advising of said judgment and demand upon the company for payment of its bonds upon behalf of A. and P. Sandoval, my associate, Mr. H. V. D. Johns, and I took the matter up with the company's representative at Los Angeles, California, and Nogales, Arizona, as shown by originals and copies of telegrams attached to deposition of Mr. H. V. D. Johns.

Upon receipt of a further telegram from the home office to the effect that the Governor of Arizona had made formal demand
69 for payment of judgment, threatening revocation of license of our company in the Territory of Arizona if settlement was not made immediately, and also receiving information from Mr. Frank M. Kelsey at Los Angeles, California, that Mr. Epes Randolph also demanded immediate settlement of the judgment, I instructed Mr. Kelsey by telephone on June 24th, 1908, to inform Mr. Epes Randolph that if A. and P. Sandoval did not settle the judgment by three o'clock of that afternoon, I would authorize him to draw upon this office for the full amount of the judgment. At 3:30 P. M. Mr. Catesby C. Thom telephoned me from Los Angeles, California, advising that the judgment had not been paid. I, therefore, authorized him to pay the amount to Mr. Epes Randolph, and draw on the United States Fidelity and Guaranty Company for the full amount. In accordance with my instructions, draft was drawn and paid as shown in the deposition of Mr. W. H. Alexander."

Mr. JUTTEN: I want to object to that portion of this answer that refers to the letters and telegrams that he received from the United States Fidelity and Guaranty Company. I have no objection to his stating what he did, but his answer is not responsive. That portion that refers to letters and telegrams that he received, all that portion except what he did in connection with it I think it is entirely objectionable, and I would like to have the Reporter read the question and that part of the answer.

70 Mr. IVES: I will state this in connection with that. The application and contract between the United States Fidelity and Guaranty Company and the Sandovals contains in it a clause to the effect, as we construe it, that the Sandovals will reimburse them for all expenses that may accrue in connection with such bond. Now, I care nothing about these telegrams in respect to the materiality, but simply as a basis for the expenses of Messrs. Baldwin and Johns in connection with this bond.

The COURT: In other words, you don't care anything about the gist or the contents of the letters and telegrams, but want them in the deposition only to show that such letters and telegrams were received?

Mr. IVES: I offer them simply to show the expense we have been to in connection with this.

Mr. JUTTEN: That is not the way to prove an account.

Mr. IVES: That is not to prove the account; if we said we spent four dollars for a telegram, they could ask us for the telegram.

Mr. MORRISON: "Upon receipt of a telegram from the home office

of my company, advising of the judgment and demand upon the company for payment of its bonds in behalf of A. and P. Sandoval, my associate, Mr. H. V. D. Johns." Now then, I ask to have all that portion stricken out. Then he goes on: "I took up the
71 matter with the company's representative at Los Angeles, California, and Nogales, Arizona, as shown by originals and copies of telegrams." Now, I ask that that portion "as shown by telegrams attached to the deposition of Mr. Johns, and also upon the receipt of a telegram from the home office to the effect that the Governor of Arizona had made final demand for payment of the judgment, threatening revocation of license of our company in the territory of Arizona if settlement was not made immediately, and also receiving information from Mr. Frank B. Kelsey at Los Angeles, California, that Mr. Epes Randolph also demanded immediate settlement." I ask that that part of it be stricken out. "I instructed Mr. Kelsey by telephone on June 24th, 1908, that if Mr. A. and P. Sandoval did not settle the judgment by three o'clock of that afternoon, I would authorize him to draw upon this office for the full amount of the judgment. At 3:30 P. M. Mr. Catesby C. Thom telephoned me from Los Angeles, California, advising that the judgment had not been paid. I therefore authorized him to pay the amount to Mr. Epes Randolph, and draw on the United States Fidelity and Guaranty Company for the full amount. In accordance with my instructions, draft was drawn and paid as shown by the deposition of Mr. W. H. Alexander." I ask to have that stricken out.

Mr. IVES: I make no objection to the contents of any tele-
72 grams to be stricken out, but the receipt of them, however, I ask that they be left in.

Mr. JUTTEN: For that purpose, we submit that that answer was not responsive to the question.

The COURT: Now, I guess I have marked about how I will rule on it.

Mr. IVES: The following portion is stricken out of the answer of interrogatory No. 5: "Advising of said judgment and demand upon the company for payment on its bond in behalf of A. and P. Sandoval". Now again: "As shown by originals and copies of telegrams attached to the deposition of Mr. H. V. D. Johns". Again: "To the effect that the Governor of Arizona had made final demand for payment of the judgment, threatening revocation of the license of our company in the Territory of Arizona if settlement was not made immediately". And again: "As shown in the deposition of Mr. W. H. Alexander", and leaving the answer reading as follows: "Upon receipt of telegrams from the home office of my company, my associate, Mr. H. D. V. Johns, I took up the matter with the company's representative at Los Angeles, California, and Nogales, Arizona. Upon receipt of a further telegram from the home office, and also receiving information from Mr. Frank M. Kelsey at Los Angeles, California, I instructed Mr. Kelsey by telephone on June 24th, 1908, to inform Mr. Epes Randolph that if A. and P. Sandoval did
73 not settle the judgment by three o'clock of that afternoon, I would authorize him to draw upon this office for the full

amount of the judgment. At 3:30 Mr. Catesby Thom telephoned me from Los Angeles, California, advising that the judgment had not been settled. I therefore authorized him to pay the amount to Mr. Epes Randolph and draw on the United States Fidelity and Guaranty Company for the full amount. In accordance with my instructions, draft was drawn and paid".

Interrogatory No. 7. Answer: The moneys expended for my trip to Los Angeles, California, above referred to, amount to $61.15, as shown in the statement of expenditures marked "Exhibit B", and attached to the deposition of Mr. W. S. Alexander."

Mr. MORRISON: I object to that portion of the deposition that refers to the deposition of Mr. Alexander.

Mr. IVES: Strike that out; I consent. That leaves it that he spent $61.15.

Mr. IVES: Now, I read the deposition of Mr. H. V. D. Johns.

Mr. MORRISON: We ask that the telegrams be struck out from the deposition.

The COURT: The body of the telegrams will not be considered.

Mr. IVES: I call the Court's attention that the total was $82.20.

Mr. MORRISON: We admit that the telegrams amount to
71 that, but the telegrams are not to be used.

Mr. IVES: Now, the next I introduce the deposition of Mr. W. H. Alexander.

(Said deposition was read in evidence.)

Mr. JUTTEN: I would like to move to strike out the expense account. The account has not been proved in a lawful way. I don't believe that any one can testify that he spent so much in connection with this case; I believe he has to say what it is for, and when it is for. In other words, establish the various items of the account, it not being one transaction taken as a whole, but various individual transactions.

Mr. IVES: That is the money that they have paid out, but whether the Court should think they are proper payment, and for which they should be reimbursed, is a different question.

Mr. JUTTEN: It does not give us an opportunity to investigate any of the items and see whether they were proper items.

The COURT: The objection will be overruled.

Mr. MORRISON: We want to object to Exhibits C and D to the deposition. One is a draft drawn by Frank Kelsey on the United States Fidelity and Guaranty Company—drawn by Frank M. Kelsey to the United States Fidelity and Guaranty Company, and
75 endorsed on the back by Catesby C. Thom as attorney in fact, and the other one seems to be a check on the Merchants' Trust Company, signed by the United States Fidelity and Guaranty Company.

Mr. IVES: Now, I don't care anything about Exhibit D, but Exhibit C, which is a draft drawn by Catesby C. Thom on them, I want in.

The COURT: Exhibit D is stricken out.

Mr. MORRISON: That would not bind us in any way. Any draft that might be drawn on the United States Fidelity and Guaranty

Company by Thom, it would not be proof that they paid somebody else.

Mr. IVES: The grounds of the testimony is that Catesby C. Thom drew a draft——

The COURT: They do not go to establish any additional charge against the company, but simply as explanatory of the manner in which they, according to their business methods, paid the draft already put in.

Mr. IVES: Now, I read the deposition of Alfred P. Fuller.

Interrogatory No. 2: State whether during the months of April, May, June and July of 1908, you had any business association with the United States Fidelity and Guaranty Company, the above named plaintiff, and if so, what?

76 Answer to Interrogatory No. 2: I did. I was requested by telegraph from the San Francisco office of the United States Fidelity and Guaranty Company, to locate A. and P. Sandoval, and demand indemnity to the amount of $11,500.00.

Mr. MORRISON: We move to strike that out as not being responsive to the question.

The COURT: I will rule on that objection later.

Interrogatory No. 6: State whether you incurred any expense on behalf of the United States Fidelity and Guaranty Company in connection with the said judgment, or in any matter relating to the same, and if so, give an itemized statement of the moneys expended by you and the purpose for which said moneys were expended.

Answer: In pursuance of my employment with the United States Fidelity and Guaranty Company, I found that P. Sandoval had an office in the Union Trust Building. I went there and on June 16th at 2:30 o'clock P. M. met Mr. A. Orfila, who was in that office, and who claimed to be an attorney, and said that he represented Mr. P. Sandoval, and in this matter he was associated with Mr. H. S. Van Dyke, a prominent attorney in this city; that Mr. P. Sandoval had just notified them by wire that he was in Phœnix, Arizona, wired full authority to sign and execute on behalf of himself and

77 A. Sandoval, bonds for $25,000, to take up the present obligations, thus clearing the matter on which the San Francisco office of the United States Fidelity and Guaranty Company wired me to get the $11,500 surety. Mr. Orfila stated that the matter had been arranged and full authority forwarded to Mr. P. Sandoval at Phœnix to sign and execute all necessary papers. He also stated that he expected word from Arizona on the 17th and that he would communicate with me the next afternoon, whether he received the information or not, and would give me full data as soon as he got it. One other person was present in the office during this conversation, whom I did not know.

Mr. MORRISON: My objection is that there is no authority whatever that Mr. Orfila has any authority to act on behalf of either of the defendants in this action, and move to strike it out.

Mr. IVES: I consent that it go out.

Interrogatory No. 7: State whether or not you had any other conversation or conversations with the said A. Sandoval or P. Sandoval,

or any of them, or any one purporting to represent them or either of them, and the respective times and places of each of such conversations, and who were present at each of them, and all that was said thereat?

78 Answer to Interrogatory No. 7: On the 19th of June, 1908, I called at the office again, and remained there for some time, awaiting Mr. Orfila's return. I was told by the clerk in the office that he was out, did not know when he would return, but that he would phone in some time during the afternoon. Later in the afternoon I talked over the phone with Mr. A. Orfila, in which he referred to the conversation we had had earlier in the week, on the 16th day of June, and stated that he had not heard from Phœnix either in answer to his wire or his letter; that he knew nothing further of the matter than what he told me the first day that I saw him. He now stated, however, that he had received a telegram from a Mr. Williams, an attorney in Phœnix, in which he stated that Frank Lyman of Phœnix, who represented A. and P. Sandoval in this matter, had wired for authority to sign A. Sandoval's name to a bond for $25,000, said bond to be given as additional security and indemnity, to stay judgment of the claims of the United States Fidelity and Guaranty Company; or in other words, as a protection to them.

He further stated that Mr. Williams wired the United States Fidelity and Guaranty Company at their San Francisco office on the 15th, that action had been taken to assist in the matter. As stated, Orfila said that he knew nothing more that would be of interest in this matter; that he himself was waiting patiently for either wire or communication of some kind from Frank Lyman. He suggested

79 that I wire Lyman, but this I thought would be best to go from the San Francisco office, if there was anything to be gained thereby. Mr. Orfila also suggested that I telephone Mr. A. Sandoval and I probably could get some further information from him. I told Mr. Orfila that I would be only too glad to communicate with Mr. A. Sandoval at his home in Los Angeles, where he then had an office, and have a talk with him, either by phone or in person. I immediately phoned Mr. A. Sandoval's home, and met with the same success I had every time I had tried to reach him, either by phone or in person, receiving the answer that he was not at home. Mr. Orfila called me up a little later, and informed me that he had called Mr. Sandoval's home, and the girl had informed him that Mr. and Mrs. Sandoval had gone to the matinee. I then told Mr. Orfila that I thought we had played hide and seek long enough, and that I thought as a business man, Sandoval should make some arrangement to meet me; that it certainly did not look right, and had a bad odor to it, for him to continually avoid the issue, and that I would like to have him make some arrangement whereby A. Sandoval and myself could get together, and that I wanted same to take effect the next day.

On the 23rd of June, 1908, I met Mr. Orfila at the entrance of the Union Trust Building, and asked him if he had received any information from Phœnix. He stated that he had not, but suggested

that I wire Mr. Frank Lyman. I told him that I thought it
80 was his place to wire, and suggested his doing so immediately. He replied that he would, but that he had no funds to expend on account of Mr. Sandoval. I then told him that if he would wire that I would stand the charges, and give him 50c. with which to send the message.

On the 24th Orfila telephoned me that he had received a letter from Mr. Lyman of Phœnix, in which he stated that the matter of a supersedeas bond would have been filed several days before, had it not been that when Mr. P. Sandoval called on the United States Fidelity and Casualty agent, at Nogales, for the purpose of making application for the bond, that the gentleman was out of town; that Mr. Sandoval boarded the train, going direct to Phœnix, made application to the agent there for a $25,000 bond and was informed by the agent that it was impossible for him to execute a bond in that sum without authority from the home office; that Mr. Sandoval then called on the representatives of several bonding companies in Phœnix, but was unable to secure a bond in that sum; that he immediately returned to Nogales, where he again applied to the United States Fidelity and Guaranty Company's agent, who accepted the application, and the bond had been sent to Judge Campbell for approval; that the bond would undoubtedly have been approved by the time Mr. Lyman's letter reached Mr. Orfila. The above conversation on the 23rd and 24th took place without any other person being present thereat.

81 All of the above transactions and telephone conversations, and everything with respect to which I have testified were acts in the course of my employment by the United States Fidelity and Guaranty Company, in connection with the judgment obtained by Epes Randolph in Arizona, against A. and P. Sandoval and said Company."

Mr. MORRISON: We move to strike it all out; there is no statement that the company met or talked with Mr. Sandoval in any way.

Mr. IVES: I withdraw that question and answer for awhile.

The COURT: Very well.

Mr. IVES: They allege in their answer that this was a voluntary payment.

Mr. JUTTEN: I understand the same is with reference to interrogatory No. 6?

Mr. IVES: Yes, let it be withdrawn for the present.

Mr. MORRISON: We make the same objection to the items of the account as we did before.

Mr. JUTTEN: We object to this account in view of the fact that Your Honor admitted the Auditor's statement. That being true, we object to any further expenditures being introduced.

The COURT: I said that I would look at it; I didn't understand that you had objected to the former claims.

82 Mr. JUTTEN: No, sir, we did not. We would not object to them; they were contained in the Auditor's statement.

Mr. IVES: The Auditor's statement would only be in corroboration of these.

The COURT: The objection will be overruled.

Interrogatory No. 9. If in answer to any of the foregoing interrogatories, you state that either A. Sandoval or P. Sandoval said that he would meet you later, state whether you were present at the time and place of such meeting, and whether he appeared at such time and place.

Mr. MORRISON: That, of course, is subject to the objection that there has been no conversation that they were to meet at any other place. There is no evidence that there was any conversation with A. Sandoval or P. Sandoval.

Mr. IVES: I will withdraw that question for a moment.

The COURT: Very well.

Mr. IVES: I will call Mr. Galbreth.

C. D. GALBRETH, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. IVES:

Q. Mr. Galbreth, your name?

83 A. C. D. Galbreth.

Q. And your occupation?

A. Special Agent for the United States Fidelity and Guaranty Company.

Q. How long have you held that position?

A. Since March, 1906.

Q. Now, kindly state whether you did anything in connection with this judgment of Randolph's against A. and P. Sandoval?

A. That is, from the start of my connection with it?

Q. From the start of your connection with the subject matter?

A. On June 24th I was in Sacramento and received a telephone message from Mr. Johns to immediately come into San Francisco as there was a loss in Nogales on the Sandoval matter. I came into the office and went over the case with them, and he told me that the company had paid the judgment, and I was given instructions to immediately proceed to Nogales and get reimbursed for what we had paid out. I stopped over in Los Angeles, I think it was the 27th, the morning of the 27th I arrived in Los Angeles, and I talked the case over with Catesby C. Thom, who was the manager of our department there, and he told me that he had paid the money out.

Mr. JUTTEN: Now, if the Court please, we object to — Mr. Johns and Mr. Thoms said.

84 Q. You can't state what they said to you?

A. Well, I met them there, and got an insight into the matter in regard to the loss further than I had had it from our office. I then went to Tucson, and talked the matter over with Mr. Randolph.

Q. You can't state what was said. Pass on?

A. I proceeded from there to Nogales, this point. Do you want me to say what conversation took place between Mr. Sandoval and myself?

Q. Yes, anything that Mr. Sandoval said to you, you can testify.
A. The morning after I arrived here, I went——
Q. About what date was this?
A. I should judge about the 30th.
Q. Of June?
A. Of June, yes.
Q. Go ahead?
A. It might have been the first of July. I went to Mr. Sandoval's office across the line here, and had a talk with one of the Mr. Sandovals, the youngest one of the two.

Mr. MORRISON: Was that Mr. A. or Mr. P. Sandoval?

A. I don't know; it was the youngest one of the two.

85 Q. It was one of the two?

A. It was the one who told me that he was the acting cashier of the bank.

Q. Go ahead.
A. He said that his brother——

Mr. JUTTEN: If the Court please, I don't think that testimony is admissible unless he can say he talked with Mr. A. or P. Sandoval right here.

Q. Was it one of the two defendants?
A. It was one of the Sandovals.

The COURT: Was it one of these two Sandovals?
Mr. MORRISON: There is several of them; I met two of them here, and there is another in Los Angeles.

The COURT: Is the cashier of the bank one of the defendants?
A. No, sir.

Witness excused.

Mr. IVES: I will call Mr. Bird. I don't suppose you will require Mr. Bird to be sworn.
Mr. MORRISON: No.

ALLEN T. BIRD, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

86 Direct examination by Mr. IVES:

Q. Mr. Bird, you know Mr. A. and P. Sandoval?
A. Yes, sir.
Q. They are engaged in business in Nogales, Sonora?
A. Yes, sir.
Q. The defendants in this action?
A. Yes, sir.
Q. What is their business?
A. Banking and Brokerage.
Q. Do you know who was in charge of their business in their absence?
A. Alfreda Sandoval.
Q. Do you know this Mr. Galbreth who has been testifying in this action?

A. I recall the day he was here.
Q. Do you know with whom he had a conversation in the bank there?
A. Prosper was out of town, and Mr. Galbreth had told me that the Sandoval that he had met there had wired Prosper to come there. I know Aredio, the defendant, was in Los Angeles at this time.
Q. And this Alfredo was cashier there?
A. He was some time back; now there is another man cashier.
87 Q. Who is the cashier now?
A. I don't know what his name is, but he stands at the desk outside, and pay- the money and takes the money in.
Q. Who does?
A. This new man.
Q. Where is Alfredo?
A. In the inner office by the desk that was formerly occupied by Alevio before he went to Los Angeles.

Cross-examination by Mr. JUTTEN:

Q. For the purpose of the record, on the day mentioned, to your knowledge, Aerlio Sandoval, the defendant in this action, was not present in Nogales?
A. He was not in Nogales to my knowledge.
Q. To your knowledge, P. Sandoval, the defendant in this action, was not here?
A. Yes, sir.
Q. The only Sandoval that you met was in the office?
A. Yes, sir.
Q. And he is not a party to this action?
A. No.

Witness excused.

88 C. D. GALBRETH, being recalled, testified as follows:

Direct examination continued:

Q. Where did this conversation take place?
A. In the back office.
Q. Of the defendant- A. and P. Sandoval?
A. Yes, sir.
Q. In Nogales, Sonora?
A. Yes, sir.
Q. Now, state what it was?

Mr. JUTTEN: We object to any conversation he had with this gentleman, it would not be proper.

A. There is no material evidence in that, it is only leading up to the conversation I had with the Sandovals.
The COURT: Did you ever see the Sandovals?
A. Yes, sir.
Q. Where was that conversation?

A. Do you want me to state what transpired between the other ones?

Q. Yes, sir.

A. Well I spoke to this Sandoval who was in charge there,
89 and he told me that his brother was down the line.

Mr. MORRISON: Don't say what he told you.

A. Then he told me he wired Mr. P. Sandoval to come in, that I wanted to have a talk with him in regard to the loss we paid.

Q. Did you thereafter meet Mr. P. Sandoval?

A. I did.

Q. Where?

A. He came in the second day after he sent word, and told me that he would meet me at 7:30 at his office.

Q. Did he meet you as the result?

A. Yes, sir.

Q. Now state what was said?

A. I made a demand on him for the amount that we had paid out, and he said he had instructions from his attorneys, and showed me the wire from Allen to not pay the judgment. I talked the matter over with him: I told him we had paid it out, and that he had guaranteed to reimburse us. "Well," he says, "if I reimburse you and the case is lost in the upper court, the attorneys will blame me for it." I says, "Well, it has cost you a bunch of money so far, and it will cost you a bunch more if that is not paid, and you will save in the neighborhood of thirty-five hundred or four thousand dollars by paying this judgment."

90 He then said that he would talk it over, that he wired rather to Mr. Lyman of Phœnix to meet him in Tucson on July 4th, and asked me to meet him in Tucson on July 4th to settle what they would do. Mr. Sandoval met me in Tucson on July 4th at the Santa Rita hotel, and told me that through an error of a stop watch of Mr. Lyman's that he missed the train, but would be over the following day, or two days after that; two days after that, and that he was going back to Phœnix—or back to Nogales rather and would come back to Tucson in a couple of days. I saw him two days after that in Tucson, and went over the matter with him again, and made this proposition to him, that if he would put up approved collateral, and put it in any bank in Tucson, that I, as representing the company, would let the matter rest until the case was decided in the United States Superior Court.

Q. The Supreme Court of the United States?

A. Supreme Court of the United States, and he said "no, he would not do that," that he was going to stand by the advice of his Los Angeles attorneys. I had a talk with Mr. Lyman who was representing him there, and Mr. Lyman——

Q. Was Sadoval present when you had the talk with Lyman?

A. I don't think he was.

Q. Did Sandoval say anything to you whether he represented him?

A. He said Lyman was representing him at the time.

91 Q. Now, state what Lyman said to you?

A. I told Mr. Lyman the same proposition that I had told

Mr. Sandoval, that if they would put up approved collateral security in any bank in Tucson, that the company would let the matter rest until it was decided in the Supreme Court of the United States. Mr. Lyman says "that is a very fair offer, and my advice to him is to do it."

Q. Now, what else did you do; go ahead after that?

A. After Mr. Sandoval decided not to acknowledge our claim in any way, I took the matter up with our representing attorney there, Mr. Hereford.

Q. Frank H. Hereford?

A. Frank H. Hereford, and we talked the matter over, and he told me there was——

Mr. MORRISON: I object to any conversation between him and Mr. Hereford.

Q. You can't say what you told Mr. Hereford or he you. You had a talk with Mr. Hereford?

A. I had a talk with Mr. Hereford.

Q. Did you instruct him to do anything?

A. I instructed him to proceed with the case.

Q. To collect the money?

A. To collect the money.

Q. What did Mr. Hereford do?

92 A. Mr. Hereford phoned down there and had the remitt*a*-r brought down and signed, and we went——

Mr. MORRISON: We object to any testimony of what Mr. Hereford done, unless done in the presence of the witness. He doesn't know what Mr. Hereford did unless he was there.

The WITNESS: I am testifying to what I know Mr. Hereford did.

The COURT: If you know Mr. Hereford did it you can testify to it.

Q. Now, state what Mr. Hereford did?

A. I was in Mr. Hereford's office when he called up Nogales and had a talk with Mr. Bird, I think, in regard to bringing or sending the remitt*a*-r to Tucson, and I was in Mr. Hereford's office when the remitt*a*-r came in; I was there when he dictated to the stenographer instructions to the sheriff.

Q. To do what?

A. To make a demand——

Mr. JUTTEN: If the Court please, the instructions are the best evidence.

The COURT: He heard him dictate it.

A. His instructions to the sheriff were to make a demand on the president and vice president of the Merchants' Bank and Trust Company of Tucson for fourteen thousand dollars, par value of the

93 Bank of Sonora stock which was in their possession.

Q. Belonging to whom?

A. Belonging to A. and P. Sandoval.

Q. Now, what was the result of that?

A. The sheriff made a return that they denied the stock being in their possession.

Q. The bank did?

A. Yes; and I went over to the bank, and in conversation with the cashier and he told me that he had a wire that morning from P. Sandoval to take the stock out of the bank.

Q. Well, did you get the stock; did the sheriff get the stock?

Mr. MORRISON: Just a moment; we move to strike out tha answer.

The COURT: The objection will be sustained.

Q. Now, what else, Mr. Galbreth?

A. What part was stricken out?

Q. What the banker said to you.

Mr. MORRISON: I understand the theory upon which Mr. Ives is putting it in, that he is proving the value of the services of this man, Mr. Hereford. Now, how can he go under that and introduce the return of the sheriff and what the result of the sheriff's actions were. It seems to me that it is clearly incompetent, irrelevant and immaterial, and for that reason I ask that the answer of the
94 defendant be stricken out, except in so far as the testimony goes to show what he himself personally did, and what Mr. Hereford, his attorney, did.

Q. That was in Tucson, was it not?

A. Yes, sir.

The COURT: Motion granted.

Q. Now, Mr. Galbreth, what else did you do in the matter?

A. I instructed Mr. Hereford to go ahead in the case—I instructed Mr. Hereford to go ahead with the case, and left it to his judgment.

Q. Now, how much money did you expend, Mr. Galbreth, that you have testified about in this matter?

A. Two hundred and forty-eight dollars and some odd cents.

Q. If these gentlemen wish it, you can give an itemized statement of this amount.

Mr. MORRISON: It is in the Auditor's report there.

Q. Now, has Mr. Hereford been paid?

A. No sir.

Q. Has he as yet rendered a bill?

A. I could not say, because I don't know what has been rendered to our office, but I think there was some talk or some communication that the bill was about two hundred and fifty dollars.

95 Mr. MORRISON: We object to what the little talk was.

Q. Mr. Galbreth, how much money have you expended in coming here to attend this trial since, and in connection with these matters of this bond of Sandovals since the expenditures with respect to which you have testified?

A. You mean expenditures on this trip?

Q. Yes, sir.

A. In the neighborhood of two hundred and fifty-five dollars.

Mr. IVES: I have to allege that by supplemental complaint.

Mr. JUTTEN: If the Court please, I would like to raise the question

in some way whether the expenses of the witness in coming to this trial are proper charges against the defendant in this action. The law provides that certain payment shall be made to witnesses in this particular case.

The WITNESS: Mr. Sandoval's contract calls for all expenses.

Mr. IVES: I will argue that.

Witness excused.

E. S. IVES, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

I am an attorney and counsel- at law, practicing in Arizona. I was employed by the United States Fidelity and Guaranty
96 Company to advise them, and to act in their behalf in collecting their claim against A. and P. Sandoval, by reason of the payment which they had made to Randolph, as testified to. I was engaged by Mr. James H. Borland, of the firm of Borland and Johns of San Francisco, representing the United States Fidelity and Guaranty Company. I first made investigation as to whether A. and P. Sandoval had money in the Territory of Arizona, and I then made investigation as to whether they had money in the Republic of Mexico, and examinations as to the success with which a judgment of the courts of Arizona could be proceeded upon in Mexico, with a view of collecting the same on the property held by the defendants in the Republic of Mexico, and, after these investigations, I filed the complaint in this action. Since the filing of it, I have had to examine the question of law that I knew might arise in the prosecution of this suit. I went to San Francisco to see Mr. Borland and Mr. Johns and Mr. Alexander, and discussed with them the matters in connection with this case, and determined on what character of evidence I would interrogate them about. I also communicated with the private secretary of the Governor, and I went to Los Angeles, and there saw Mr. Fuller, whose deposition has been made, and had a talk with him about what he had done in these matters, and what testimony of his I thought would be material, and also inter-
97 viewed Mr. Catesby C. Thom, and then came down here, and then proceeded to try this lawsuit for the plaintiff. I agreed with Borland and Johns that I would render all service necessary for them, and receive what money they were entitled to, and they agreed to pay me a reasonable value for the services renderd.

Cross-examination by Mr. MORRISON?

Q. Mr. Ives, the draft that is in evidence was given to you for Mr Randolph?

A. Yes, sir.

Q. You had some conversation over the 'phone with Mr. Borland or Mr. Johns from San Francisco in regard to the payment of that draft?

A. You mean about the time of the payment?

Q. Yes, sir.

A. Well, I had a conversation with Mr. Catesby C. Thom, and he

stood at the telephone and talked with Mr. Borland; I didn't talk personally over the 'phone with Mr. Borland.

Q. Now Mr. Ives, there was an agreement between Mr. Randolph or you as his attorney and the United States Fidelity and Guaranty Company that Mr. Randolph should give them a bond, pro-
98 viding if they would pay this money—providing that if they would pay this money, etc., that he would indemnify them?

A. The conversation that occurred was this, Mr. Morrison, Mr. Thom talked with Mr. Borland; I insisted in my talk with Mr. Thom and Mr. Kelsey that this money should be paid, and told them that I would insist that the Governor revoke the license if the money was not paid, and Mr. Thom then at about one o'clock, stated to me, he was talking over the 'phone at the time to Mr. Borland, that Mr. Borland wanted to pay it, but that for all they knew the supersedeas bond might be deemed filed by Sandoval and Company in Phoenix at that very minute, and thereupon I stated that that expense might be met at any time, and thereupon Mr. Thom again talked to Mr. Borland, repeated what I had said and Mr. Thom then again said that Mr. Borland said that if the word did not come that the bond had been filed before three o'clock, precisely at three o'clock they would pay me the amount of the judgment, provided I would secure them if it should thereafter transpire that prior to three o'clock, and I assured them that should it afterwards transpire that the supersedeas bond had been filed prior to that date, that I would return the money, and also that I would return it if it was not proper that they should have paid it. Now, exactly as to what transpired between Thom and Borland on that point I don't know. The money was paid, and it transpired that the bond had not been filed
99 at that time. Now, if you want me to state what occurred afterwards between Mr. Borland and myself, I will?

Q. Yes.

A. After that I went to Los Angeles, it was about the 15th of July, may be the 25th, I can find the precise date in a little while, but in any event Mr. Borland, Mr. Randolph and Mr. Kelsey were present, and Mr. Borland stated that we had agreed, as he understood it, with Mr. Thom that if it was not proper for them to have made the payment, I would return it, and wanted to know what we would do under the circumstances, and I resisted that and said that the only agreement was that if the bond should turn out to have been filed before three o'clock, that we would return it, and then there was an issue about it, and I said to Mr. Borland that in case the judgment should be reversed by the Supreme Court of the United States (it was stated in the conversation that the Sandovals had appealed to the Supreme Court of the United States) that Randolph would have no objection whatever to giving them a bond to that effect.

Q. Did you give that bond?

A. Yes, sir.

Q. Have you the bond?

A. Yes, sir, I have a copy of the bond.

Q. Will you give me that copy?
100 A. Yes, sir.

Mr. IVES: I want to object to this being offered as a part of my case, this bond.

Mr. MORRISON:

Q. You said that the bond was executed as a part of the transaction with these people?
A. Yes, I have the bond in my hand, or a copy of it.
Q. That is a copy?
A. Yes, sir, that is a copy.

Mr. MORRISON: We will offer it in evidence.
Mr. IVES: Now, I object to it as not proper cross examination at this stage of the case.
The COURT: Yes.
Mr. MORRISON: I will withdraw it right now.
Witness excused.

FRANK J. DUFFY, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. IVES:

Q. Mr. Duffy, you are an attorney at law?
101 A. Yes, sir.
Q. And have been for how many years?
A. About ten years.
Q. Practicing in Arizona?
A. Yes, sir.
Q. Now Mr. Duffy, you have heard the testimony of Mr. Ives in this case regarding the services he has rendered?
A. Yes, sir.
Q. Just given?
A. Yes, sir.
Q. Will you please state what, in your opinion, is a fair compensation for such services, based upon the amount of recovery in the action?
A. Based upon the amount of recovery in the action?
Q. Yes, sir.
A. I should say——

Mr. JUTTEN: If Your Honor please, would it be proper for us to interpose an objection at this time, on account of its immateriality, and on the further ground that under the present circumstances and the statutes in the case, the amount of recovery is not a suitable feature in determining the amount of reasonable attorneys' fees. I object to the question as incompetent, immaterial and irrelevant.

The COURT: The objection to the question will be sus-
102 tained. The question is what would be the value of the services, considering the amount in controversy and the amount of labor required.

Q. Mr. Duffy, I ask you in forming your opinion as to the value of the services, did you take into consideration the amount involved.

A. Yes.

Q. Now, assuming that the amount involved in this case — between twelve and thirteen thousand dollars, I would ask you what, in your opinion, you would consider a reasonable attorney fee for the services rendered as testified about?

A. In determining the services rendered, and the amount involved?

Q. Yes, sir?

A. Well, I should say fifteen to twenty per cent; I should say that was fair.

Q. Contingent upon success or failure?

A. Yes, sir.

Q. The plaintiff if successful, how much?

A. In recovering you mean?

Q. Yes.

A. Just in recovering?

Q. Yes?

A. Well, I should say twenty to twenty-five per cent if successful in recovering.

Mr. MORRISON: How much if he did not recover, Mr.
103 Duffy?

A. Well, it would be somewhat different.

Mr. IVES: I think that is not material, because the defendant would not be interested in it, because there would be no judgment against the defendant.

Mr. MORRISON: I will withdraw the question.

Cross-examination by Mr. JUTTEN:

Q. Mr. Duffy, in saying that you consider such an amount reasonable in case of recovery, do you mean recovery of the money or recovery of the judgment?

A. Recovery of a judgment of the Court.

Q. You think that the fact that the counsel for the plaintiff was unable to get the money would be immaterial?

A. I would consider that the work done by the attorney, the work in preparing the case, and the circumstances connected with it, and the services performed in his own testimony understand, I think that would be a fair consideration.

Q. In other words, in case the plaintiff should recover in this action, a judgment should be rendered by reason of this action, or any process issued thereunder and the plaintiff was unable to
104 collect it, you would nevertheless consider twenty-five per cent of the amount prayed for as a reasonable attorney fee?

A. What is the——

Q. The reasonable amount would be twenty-five per cent, which you would feel justified in giving?

A. I said at first twenty per cent., fifteen to twenty per cent would be reasonable, considering all the services which the attorney says he has performed.

Fifteen to twenty-five per cent in a thirteen thousand dollar case is a wide range?

A. The first question was in case of recovery, and I should say anywhere from fifteen to twenty-five per cent I should think.

Q. You would say a reasonable amount would be fifteen per cent?

A. From fifteen to twenty per cent.

Q. By "recovery" you mean what?

A. I mean a judgment.

Q. Irrespective of the amount of money realized?

A. Yes, because it would consist of the amount of work done by the attorney.

Witness excused.

Mr. IVES: Plaintiff rests.

And the plaintiff here rested.

105 E. S. IVES, being called as a witness on behalf of the defendants, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. MORRISON:

Q. You made this, did you? (Hands witness paper.)

A. I have not compared the copy, but I had my stenographer make a copy of it, and I presume it is a copy.

Q. I want the record definite on that?

A. For that purpose, I will swear that that is a copy, subject to correction if there should be any mistake about it.

Mr. JUTTEN: Then we will offer this bond in evidence.

Mr. MORRISON: We offer this in evidence.

Mr. IVES: I object to it as immaterial. The evidence is that the payment was made on the 24th of June, and after that a controversy arose as to the precise terms of it, and we gave that bond later on.

Mr. MORRISON: Mr. Ives, it is stipulated that the copy that is offered in evidence is an absolute copy of the original bond?

Mr. IVES: Yes, sir.

Mr. JUTTEN: And moreover, Mr. Ives, as a witness, you
106 testify that that bond was executed by the parties?

Mr. IVES: On the date which it bears.

Mr. JUTTEN: And by the parties by whom it is apparently executed?

Mr. IVES: Yes, sir.

Mr. JUTTEN: In connection with this payment?

Mr. IVES: As testified to.

The COURT: I will overrule the objection.

Said paper was marked "Exhibit 1," and introduced in evidence, and is with the papers in this cause.

Mr. MORRISON: Now, I offer in evidence a certified copy of the record in the Supreme Court of the Territory of Arizona.

Mr. IVES: No objection.

Said paper was marked "Exhibit 2," and introduced in evidence, and is with the files in this cause.

Mr. JUTTEN: Will you stipulate that there is admitted, and into the record the various statutes of the United States?

Mr. IVES: I don't think it is necessary; the United States statutes are our statutes.

FRED P. MORRISON, being called as a witness on behalf of the defendants, and having been duly sworn according to law, testified as follows:

107 Direct examination by Mr. JUTTEN:

Q. You admit Mr. Morrison's qualifications, I presume?

Mr. IVES: Yes, sir.

Q. Mr. Morrison, you have heard the testimony of Mr. Ives, in reference to the various acts done by him in reference to the prosecution of this suit, and are familiar with the pleadings, evidence and the trial thereof?

A. Yes, sir.

Q. I would ask you to state what you would consider would be a reasonable attorney's fee?

A. Ten per cent.

Q. Is that in the event of success or failure, or do you consider either of those facts?

A. I think if he recovers a judgment he would be entitled to ten per cent attorney's fees, and if he did not, seven hundred and fifty dollars would be a reasonable attorney's fee.

Q. That is without any consideration of whether the money was actually obtained?

A. Yes, sir; if he gets a judgment, he would be entitled to attorney's fees.

Q. That is all.

Mr. IVES: That is all.

Witness excused.

Mr. IVES: In the testimony of Mr. Galbreth, he testified
108 that he had Mr. Hereford do some work. I consider that the services rendered by Mr. Hereford in this case were reasonably worth two hundred and fifty dollars. I omitted it when I was on the stand.

Mr. JUTTEN: That is our case.

And the defendants here rested.

F. M. HARTMAN, being called as a witness on motion of the Court, and having been duly sworn according to law, testified as follows:

Examination by the COURT:

Q. From what you have heard of this case. You have heard the testimony of counsel in regard to the amount in controversy, and the amount of labor required for it, what would you consider would be a proper fee in this case?

A. I think about fifteen per cent.

Cross-examination by Mr. JUTTEN:

Q. Based on recovery, Mr. Hartman?
A. Yes, sir.
Q. And realizing on the judgment?
A. Yes, sir.
Q. Now, assuming that the judgment was not realized upon, and the case was decided in favor of the plaintiff?
109 A. Not over ten per cent.

Witness excused.

SELIM M. FRANKLIN, being called as a witness, on motion of the Court, and having been duly sworn according to law, testified as follows:

Examination by the COURT:

Q. You have heard the testimony of counsel, and the witnesses in regard to attorney fees in this case?
A. Yes, sir.
Q. From what you have heard of the testimony, what would be a reasonable attorney fee?
A. I think ten per cent in the event of success would be a very liberal fee, and seven hundred and fifty dollars in the event of failure as testified to on this stand would also be a very liberal fee.

Witness excused.

W. E. PARKER, being called as a witness on motion of the Court, and having been duly sworn according to law, testified as follows:

Examination by the COURT:

Q. You have heard the testimonay in this case in regard to this matter?
A. No, Your Honor, I did not hear that testimony.
110 Q. You did not?
A. No, sir.
Q. From what you have heard of the case, what would you consider to be a reasonable attorney fee for the counsel for the plaintiff in this case, considering the amount involved and the labor necessary?
A. Your Honor, before answering that, I would like to have a little more light on what was done.
Q. In what respect?
A. As to the main facts in the case and what labor the attorneys had to perform. I was not present when he gave his testimony.

Mr. IVES: I can put a hypothetical question to him that will cover the ground.
The COURT: Very well.

Mr. IVES: Mr. Parker, suppose that the attorney was employed by the plaintiff to consider how best to collect this money from A. and

P. S. Sandoval, they being bankers residing and doing business in Mexico, Sonora, as to where to bring the suit, and that the attorney investigated whether they had property in the Territory of Arizona, and then investigated the Mexican law with respect to extradition, and in regard to my ability to enforce the judgment there, and then went to San Francisco and interviewed witnesses there, and then Los Angeles, and had to take depositions of six or seven wit-
111 nesses in different quarters, and look up the points of law involved, what do you think would be the reasonable value?

A. What is the amount involved?

Q. Assuming that the recovery would be thirteen thousand dollars; that the judgment would be thirteen thousand dollars.

A. I should say twenty per cent.

Q. On the amount of the judgment?

A. On the amount of the judgment.

Mr. JUTTEN: That is based upon the assumption that they got the money?

A. Yes, sir.

Mr. JUTTEN:

Q. Suppose they did not get anything?

Mr. IVES: I don't think they should ask questions assuming that their clients don't intend to pay any kind of a judgment.

The COURT: In case they recovered?

A. That was based on the assumption in Mr. Ives' question that the recovery would be thirteen thousand dollars. In my opinion the amount of labor and the value thereof would be very little different if the money was not paid; the labor involved, in my opinion, would be the same. The defendant is a resident of Mexico, and I realize that the practice there is under difficulties.

Witness excused.

112 It is hereby stipulated by and between the parties that the judgment in this case may be rendered by the Judge outside of the County of Santa Cruz, and that as rendered may be sent by him by mail to the Clerk of the Court and the said judgment so rendered by him by mail shall be deemed to have been rendered in open Court on the 6th day of October, 1908, and that the party against whom the said judgment shall be rendered shall be deemed to have filed a motion for a new trial immediately after the rendition of said judgment, and it shall be deemed that said motion for a new trial shall be denied, and that the unsuccessful party shall have in open Court appealed to the Supreme Court of the Territory of Arizona from the said judgment and the order denying the motion for a new trial, all of the said acts shall be deemed as if they had been done in open Court on the 6th day of October, 1908.

And it is further stipulated that the Clerk of the Court shall enter the various things as having been done on the 20th day of October, 1908, in open Court, and that the record shall so appear.

It is hereby stipulated that no execution shall issue on said judg-

ment, for at least twenty days after the rendition of said judgment, and said stipulation to act as an order of Court staying execution for said period, in order to enable the unsuccessful party to file supersedeas bond and perfect appeal, as he may advise.

113 And this was all the evidence given.

The foregoing statement of the evidence in the above entitled cause is hereby approved.

FLETCHER M. DOAN,
Trial Judge.

December 19th, 1908.

TERRITORY OF ARIZONA,
County of Santa Cruz, ss:

I, John W. Walker, Official Shorthand Reporter of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Santa Cruz, do hereby certify that the above and foregoing eighty-one (81) pages of typewritten matter constitute and contain a full, true and complete transcript of all the evidence given and offered, the objection of counsel to the admission and receipt of evidence and the rulings of the Court thereon in the cause of The United States Fidelity and Guaranty Company, a corporation, v. A. and P. Sandoval, No. 547, and that they contain a full, true and complete transcript of all the proceedings had during the trial of said cause in said Court.

In Witness Whereof, I have hereunto set my hand in my official capacity as such Shorthand Reporter at Nogales, in said Second Judicial District, this 7th day of October, A. D. 1908.

JOHN W. WALKER,
Official Shorthand Reporter, District Court, Second Judicial District, Territory of Arizona.

114 And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause a certain Deposition of J. F. Cleaveland in words and figures following to-wit:

Deposition of J. F. Clearcland.

(Title of Court and Cause.)

Interrogatories Propounded to and Answered by J. F. Clearcland, a Witness on Behalf of the Plaintiff in the Above-entitled Action.

Interrogatory 1. State your name, age, residence and occupation?

Answer. J. F. Cleaveland; twenty-nine; Phœnix; Private Secretary to the Governor of Arizona.

Interrogatory 2. State what official position you hold in the Territory of Arizona, and how long you have held the same?

Answer. I have been private secretary to the Governor of Arizona since April 1st, 1908.

Interrogatory 3. If in answer to the last previous interrogatory you state that you are the private secretary of the Governor of Arizona, state whether or not as such secretary you are the custodian of all papers and documents required or authorized to be filed in the office of said Governor.

Answer. I am.

Interrogatory 4. Are you acquainted with one Samuel L. Pattee, of Tucson, Arizona?

Answer. I am.

115 Interrogatory 5. If your answer to the last preceding interrogatory be in the affirmative, state whether or not said Pattee was at the office of the Governor on the 19th day of June, 1908.

Answer. He was.

Interrogatory 6. If your answer to the last preceding interrogatory be in the affirmative, state whether or not at that time the Governor of said Territory wrote or caused to be written, a telegram addressed to the United States Fidelity and Guaranty Company, at Baltimore, Maryland?

Answer. He did.

Interrogatory 7. If your answer to the last preceding interrogatory be in the affirmative, state whether or not you have such telegram or a copy thereof among the files in the office of said Governor; and if so, attach such telegram or a copy thereof to this deposition?

Answer. Yes, there is a copy of such a telegram among the files in the office of the Governor, and the following is a true copy thereof:

"PHOENIX, ARIZONA, *June* 19, 1908.

The United States Fidelity and Guaranty Co., Baltimore, Md.:

Informal complaint has been lodged with me that Epes Randolph obtained judgment in Supreme Court of the Territory
116 against you on appeal bond in case of Randolph versus Sandoval on twenty-seventh March last for ten thousand and some odd dollars, and costs. That demand has been made on you for payment. That there has been no stay of judgment or steps to appeal from it. That you ignore his demand. Do you care to advise me of the reason?

JOSEPH H. KIBBEY,
Governor of Arizona."

Interrogatory 8. State if you know whether such telegram was delivered for transmission to the Western Union Telegraph Company; and if so, who delivered the same to said company, or any of its agents for that purpose?

Answer. A copy of the said telegram was delivered for transmission to the Western Union Telegraph Company at its local office by me, at the request of the Governor of Arizona.

Interrogatory 9. State whether or not, if you know, an answer was received to said telegram?

Answer. An answer was received.

Interrogatory 10. If your answer to the last interrogatory be in the affirmative, state whether or not you have a copy of said telegram or the telegram that was delivered at the office of the company; and if so, annex the same or a copy thereof to this deposition?

117 Answer. Yes: there is a copy of such a telegram among the files in the office of the Governor, and the following is a true copy thereof:

"BALTIMORE, MD., *June* 19, 1908.

Hon. Joseph H. Kibbey, Governor, Phœnix, Arizona:

Your wire regarding Randolph vs. Sandoval received. Writing you fully to-day.

THE U. S. FIDELITY & GTY. Co.

J. F. CLEAVELAND.

Subscribed and sworn to before me this third day of October, A. D. 1908. ADOLPH W. LAUTZ,

[SEAL.] *Notary Public.*

My commission expires December 12, 1910.

And on the same day to-wit: the twenty-sixth day of December, 1908 there was filed in the clerk's office of said court in said entitled cause a certain Stipulation in words and figures following to-wit:

118 (Title of Court and Cause.)

Stipulation.

It is hereby stipulated by and between the parties hereto that the deposition- of Richard D. Lang, James H. Borland, Alfred P. Fuller, Catesby Thom, Willard J. Doran, W. S. Alexander and H. V. D. Johns, or any or either of them, may be taken without commission before any notary public in any county or state where any of such witnesses may respectively be found, and that the attached interrogatories to be propounded to each of said witnesses respectively and the answers of each of said witnesses thereto, and any of the cross-interrogatories that may be prepared by the attorneys for the defendants, and the answers of each of said witnesses to said cross-interrogatories so prepaid, may be read in evidence upon the trial of the above entitled action the same as if commissions had been duly issued out of the above named Court, subject to any and all other objections, and the interrogatories and answers, and cross-interrogatories and answers, shall be subject to the same objections, except as to the form of the question, as if the witnesses were personally present and testifying.

EUGENE S. IVES,
Attorney for Plaintiff.
LAWLER, ALLEN, VAN DYKE & JUTTEN,
FRED W. MORRISON,
Attorneys for Defendant.

Dated Los Angeles, Cal., September 22nd, 1908.

119 And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the Clerk's office of said court in said entitled cause, copies of Interrogatories propounded to Richard D. Lang and his answers thereto, which reduced to questions and answers are in words and figures following, to-wit:

(Title of Court and Cause.)

Interrogatory 1. What is your name, residence and occupation?

Answer. Richard D. Lang, Baltimore, Maryland, Vice President and Superintendent of the Claim Department of the United States Fidelity & Guaranty Company.

Interrogatory 2. State whether your company received any letters or telegrams with respect or relating to the judgment obtained by one Epes Randolph against A. and P. Sandoval and the United States Fidelity and Guaranty Company, or the payment thereof from the Governor of the Territory of Arizona, or his private secretary, or any one connected with his office.

Answer. The United States Fidelity & Guaranty Company, of which I am Vice-President did receive certain communications referred to in this interrogatory.

Interrogatory 3. If you answer yes to the last question please produce such original letters or telegrams and attach same to this deposition.

Answer. I now produce as a part of my deposition in the above entitled cause original telegram dated Phœnix, Arizona, June 19th, 1908, addressed by Joseph H. Kibbey, Governor of Arizona,
120 to the United States Fidelity & Guaranty Company at Baltimore, Maryland, marked Exhibit R. D. L. #1.

I also file herewith a communication dated Phœnix, Arizona, June 19th, 1908 addressed to The United States Fidelity & Guaranty Company and signed by J. F. Cleaveland, Private Secretary, Marked Exhibit R. D. L. #2.

I also produce and file herewith communication signed by J. F. Cleaveland, private secretary containing acknowledgment of the telegram addressed to the Governor of Arizona, marked Exhibit R. D. L. #3.

Interrogatory 4. State whether your company at Baltimore has ever received any letters or telegrams from either A. or P. Sandoval, or either of them, in connection with the said judgment. If so, produce same and attach them to this deposition.

Answer. The United States Fidelity & Guaranty Company has never, to my knowledge, received any communication whatever relating to the subject of this litigation from A. & P. Sandoval, or either of them, or anyone on their behalf.

RICH'D D. LANG.

Test:
FRANK LE GRAND CARLIN.

Sworn and subscribed to before Frank Le Grand Carlin, a Notary Public on the 28th day of September, 1908, at Baltimore, Maryland.

121 EXHIBIT No. 1. R. D. L.

"PHŒNIX, ARIZ., *June* 19, '08.

The U. S. F. & G. Co., Balto., Md.:

Informal complaint has been lodged with me that Epes Randolph obtained judgment in supreme court of the territory against you on appeal bond in case of Randolph versus Sandoval on twenty seventh March last for ten thousand and some odd dollars and costs. That demand has been made on you for payment. That there has been no stay of judgment or steps to appeal from it. That you ignore his demand. Do you care to advise me of the reason.

JOSEPH H. KIBBEY,
Governor of Arizona.

3:30 P. M."

EXHIBIT No. 2. R. D. L.

"PHŒNIX, ARIZONA, *June 19th*, 1908.

The United States Fidelity & Guaranty Co., Baltimore, Md.:

Informal complaint has been lodged with me that Epes Randolph obtained judgment in Supreme Court of the Territory against you on appeal bond in case of Randolph versus Sandoval on twenty-seventh March last for ten thousand and some odd dollars and costs. That demand has been made on you for payment. That there
122 has been no stay of judgment or steps to appeal from it. That you ignore his demand. Do you care to advise me of the reason?

JOSEPH H. KIBBEY,
Governor of Arizona.

The above will confirm telegram sent you this day.

J. F. CLEAVELAND,
Private Secretary.

Claim.

EXHIBIT No. 3. R. D. L.

From BALTIMORE, MD., *June 19th*, 1908.

Hon. Joseph H. Kibbey, Governor, Phœnix, Arizona:

Your wire regarding Randolph vs. Sandoval received. Writing you fully to-day.

THE U. S. FID. AND GTY. CO.

This will acknowledge receipt of your telegram of the above date, received at this office today, a copy of which is given above.

J. F. CLEAVELAND,
Private Secretary.

123 And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the Clerk's office of said court in said entitled cause, copies of Interrogatories propounded to Catesby Thom and his answers thereto, which reduced to questions and answers are in words and figures following, to-wit:

(Title of Court and Cause.)

Interrogatory 1. State your name, residence and occupation.

Answer. Catesby C. Thom, Los Angeles, California. Surety bonding business.

Interrogatory 2. State whether or not in the month of June, 1908, and particularly on the 23rd and 24th days of said month, you had any connection, direct or indirect, with the United States Fidelity and Guaranty Company, and if so, state of what the same consisted.

Answer. I had such connection as Manager of the bonding department of the Metropolitan Bank & Trust Company, representing the United States Fidelity and Guaranty Company.

Interrogatory 3. State whether or not, on or before the 24th
124 day of June, 1908, you signed a draft upon the United States Fidelity and Guaranty Company for the sum of Eleven Thousand Four Hundred Eighty-four Dollars and some cents ($11,484.), or for an amount about that sum.

Answer. I did.

Interrogatory 4. State whether or not, on or before such date, you either individually or as a representative of Frank M. Kelsey, or any other person, signed a draft to the order of Epes Randolph.

Answer. I did, as representative of the United States Fidelity & Guaranty Company. I signed a draft of that Company to the order of Epes Randolph for $14,484.93.

Interrogatory 5. If your answer is "Yes" to the foregoing interrogatory, state to whom you delivered said draft.

Answer. To Eugene S. Ives, as attorney for Epes Randolph.

Interrogatory 6. If you say that you did deliver said draft, state whether the same was paid, and if you have the original, produce it before the Notary Public, and either attach original to this deposition, or have this original copies and the copy certified to by the Notary Public and such certified copy attached to this deposition.

Answer. The draft was paid on June 25th, 1908, as appears on the face thereof. I herewith produce the original draft and
125 ask that the same be attached to this deposition.

CATESBY C. THOM.

Subscribed and sworn to before Estelle M. Le Sage, a Notary Public, the 30th day of September, 1908, at Los Angeles, California.

EXHIBIT.

METROPOLITAN BANK AND TRUST CO.,
LOS ANGELES, CAL., *June* 24, 1908.

Pay to Epes Randolph or bearer $11484.93. Eleven Thousand four hundred and eighty four 93/100 Dollars.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Per CATESBY C. THOM.

(Stamped on face:) Metropolitan Bank & Trust Co., Los Angeles, Cal. Paid June 25, 1908.
(Endorsed on back:) Epes Randolph per Eug. S. Ives, Att'y in fact. For deposit, Eug. S. Ives.

And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause, copies of certain Interrogatories propounded to Alfred P. Fuller and his answers thereto, a copy of which is omitted by direction of attorney for appellant.

126 And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause, copies of Interrogatories propounded to James H. Borland and his answers thereto, which reduced to questions and answers are in words and figures following, to-wit:

(Title of Court and Cause.)

Interrogatory 1. State your name, residence and occupation.

Answer. James H. Borland, 2619 Pacific Avenue, San Francisco, California, manager and attorney in fact Pacific Coast Department, the United States Fidelity and Guaranty Company.

Interrogatory 2. State what your connection if any is with the United States Fidelity and Guaranty Company, the plaintiff in the above entitled action, and how long such connection has lasted.

Answer. I have represented the United States Fidelity and Guaranty Company for about four and one-half years as manager and attorney in fact.

Interrogatory 3. State if you know whether Frank M. Kelsey has any business association with the plaintiff in this action, and if so what it is and how long it has existed.

127 Answer. Mr. Frank M. Kelsey is agent and attorney in fact of the United States Fidelity and Guaranty Company in Los Angeles, California, and as such has been connected with said company since April 5, 1901.

Interrogatory 4. State if you know whether Catesby Thom has any business association with the plaintiff in this action, and if so what it is and how long it has existed.

Answer. Mr. Catesby Thom has been connected with the United States Fidelity and Guaranty Company since April 27th, 1905,

and has been an attorney in fact for said company at Los Angeles, California, since June 30th, 1905.

Interrogatory 5. State whether you did anything in connection with the judgment obtained by Epes Randolph against A. and P. Sandoval, in the Supreme Court of the Territory of Arizona, affirming a judgment of the District Court of said Territory for Santa Cruz County, the United States Fidelity and Guaranty Company having been surety upon the appeal of A. and P. Sandoval to the said Supreme Court.

Answer. Upon receipt of telegram from the Home Office of my Company, advising of said judgment and demand upon the Company for payment on its bond in behalf of A. and P. San-
128 doval, my associate, Mr. H. V. D. Johns, and I took the matter up with the Company's representatives at Los Angeles, California and Nogales, Arizona, as shown by originals and copies of telegrams attached to deposition of Mr. H. V. D. Johns.

Upon receipt of a further telegram from the Home Office to the effect that the Governor of Arizona had made final demand for payment of the judgment, threatening revocation of license of our Company in the Territory of Arizona if settlement was not made immediately, and also receiving information from Mr. Frank M. Kelsey at Los Angeles, California that Mr. Epes Randolph also demanded immediate settlement of the judgment, I instructed Mr. Kelsey by telephone on June 24th, 1908 to inform Mr. Epes Randolph that if A. and P. Sandoval did not settle the judgment by three o'clock on that afternoon, I would authorize him to draw upon this office for the full amount of the judgment. At 3:30 P. M., Mr. Catesby Thom telephoned me from Los Angeles, California, advising that the judgment had not been settled. I therefore, authorised him to pay the amount to Mr. Epes Randolph and draw on The United States Fidelity & Guaranty Company for the full amount. In accordance with my instructions, draft was drawn and paid as shown in the deposition of Mr. W. S. Alexander.

Interrogatory 6. State whether you did anything in con-
129 nection with the payment of the amount of said judgment to Epes Randolph and prior to the payment thereof, and state whether you expended for or on behalf of the United States Fidelity & Guaranty Company the above named plaintiff, any moneys in connection with said judgment, or any of the matters growing out of the same.

Answer. Upon further instructions from the home office, and owing to the amount involved, I followed up my instructions as previously stated, and proceeded to Los Angeles, California, on July 21st, 1908. On the following day, July 22nd, I met Mr. Epes Randolph and Mr. Frank M. Kelsey, at which time I discussed with Mr. Randolph the form of agreement that he should give our company, setting forth the understanding that if under any proceedings that might be instituted in the case of Epes Randolph vs. A. and P. Sandoval, it should appear that we had paid the judgment prematurely, that Mr. Randolph would refund the money to our company. At this meeting he asked that I allow the matter to go over until the following day when he would have his attorney, Mr.

Eugene S. Ives, present. On the afternoon of July 23d, 1908, I met Mr. Randolph and Mr. Ives, and Mr. Kelsey was also present, and at this meeting Mr. Randolph agreed to give our Company a bond guaranteeing the return of the money to us in case the judgment should not be affirmed.

Interrogatory 7. If so, state what moneys you so expended, giving an itemized statement thereof.

130 Answer. The moneys expended for my trip to Los Angeles, California, above referred to, amount to $61.15 as shown in the statement of Expenditures marked Exhibit "B" and attached to the deposition of Mr. W. S. Alexander.

Interrogatory 8. State whether or not you know J. J. Sweeney of Phœnix, Arizona, and whether in the months of April, May, June or July, 1908, he had any business connection with the United States Fidelity & Guaranty Company, and if so, state what such connection was.

Answer. Yes, I know Mr. J. J. Sweeney. He is connected with the firm of Ganz & Company, agents of the United States Fidelity & Guaranty Company in Phœnix, Ariz. He is Attorney in Fact for said Company at Phœnix, Arizona, and has acted as such since March 1st, 1904.

JAMES H. BORLAND.

Subscribed and sworn to before M. J. Cleveland, a Notary Public, the 30th day of September, 1908, at San Francisco, California.

And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause, copies of Interrogatories propounded to H. V. D. Johns

131 and his answers thereto, which reduced to questions and answers are in words and figures following, to-wit:

(Title of Court and Cause.)

Interrogatory 1. State your name, residence and occupation.

Answer. H. V. D. Johns, #2225 Pacific Avenue, San Francisco, California: Manager and Attorney in Fact Pacific Coast Department the United States Fidelity and Guaranty Company.

Interrogatory 2. State how long you have been connected with the United States Fidelity and Guaranty Company, the above named plaintiff.

Answer. Since February 12, 1899.

Interrogatory 3. State whether on behalf of the United States Fidelity and Guaranty Company, or as its agent, you or the firm of Borland & Johns, had any correspondence by letter, telegram with A. or P. Sandoval, relating to or in connection with the judgment obtained by Epes Randolph against A. and P. Sandoval and the United States Fidelity and Guaranty Company, with A. Sandoval or P. Sandoval, and if so, attach the originals of all such letters or telegrams to this deposition and the copies of all letters or telegrams which either you or the said firm of Borland & Johns sent to any of the above named parties.

132 Answer. Have had no direct communication either by letter or telegram with A. and P. Sandoval, or A. or P. Sandoval.

Interrogatory 4. If on behalf of the United States Fidelity and Guaranty Company, any expense was incurred in the sending of any telegrams called for by the fore-going question, give an itemized statement of all such expense.

Answer. Itemized statement of telegraphic charges above referred hereto attached with originals of telegrams received at this office, and copies of telegrams sent from this office, marked Exhibit "A."

H. V. D. JOHNS.

Subscribed and sworn to before M. J. Cleveland, A Notary Public, the *the* 30th day of September, 1908, at San Francisco, California.

EXHIBIT "A."

Telegraphic Expenses incurred in the matter of A. and P. Sandoval. (Total amount $82.20.)

Items omitted by direction of attorney for appellant.

And on the same day, to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause, copies of Interrogatories propounded to W. S. Alex-
133 ander and his answers thereto, which reduced to questions and answers are in words and figures following, to-wit:—

(Title of Court and Cause.)

Interrogatory 1. State your name, residence and occupation.

Answer. W. S. Alexander, Hotel Colonial, San Francisco, California: Cashier and Auditor Pacific Coast Department, The United States Fidelity & Guaranty Company.

Interrogatory 2. State whether you had any business association with the United States Fidelity and Guaranty Company in the months of April, May, June and July, 1908.

Answer. I did.

Interrogatory 3. State if you know whether any moneys were expended by or on behalf of the United States Fidelity and Guaranty Company in connection with or relating to the judgment obtained by Epes Randolph against A. and P. Sandoval, or against A. and P. Sandoval and the United States Fidelity and Guaranty Company.

Answer. Yes, I know there were expenditures of this character.

Interrogatory 4. If so, give an itemized statement of such moneys so expended and the purpose for which such moneys were expended.

Answer. See Exhibit "B."

134 Interrogatory 5. State whether or not, on or about the 25th day of June, 1908, a certain draft upon the United States Fidelity and Guaranty Company, or upon anyone representing them, was made by Frank M. Kelsey, or Catesby Thom, for or about the sum of Eleven thousand four hundred eighty-four dollars

and some cents ($11,484.00) and if so, state whether or not said draft was paid and when it was paid.

Answer. On June 25th, 1908, draft in amount of $11,484.93 drawn on The United States Fidelity and Guaranty Company, care of Borland & Johns, signed Frank M. Kelsey, Agt., per Catesby C. Thom, and dated Los Angeles, California, June 24th, 1908, was presented and paid.

Interrogatory 6. If your answer is that such draft was paid, produce the original draft so paid and attach the same to this deposition.

Answer. Original paid draft attached hereto, and marked Exhibit "C."

Interrogatory 7. State whether or not the United States Fidelity and Guaranty Company, or the firm of Borland & Johns, obtained from Epes Randolph, any instrument in writing acknowledging the receipt of the amount of said draft and if so, produce the original receipt and attach it to this deposition; or if the holders thereof are unwilling to part with such original receipt, then produce
135 the original before the Notary Public and have him certify to a copy thereof and attach said copy to this deposition.

Answer. The receipt I have for this payment of $11,484.93 is evidenced by the paid draft and the cancelled certified check of the Union Trust Company of San Francisco, drawn in favor of the Mercantile Trust Company for $11,484.93, both being hereto attached, and marked Exhibits "C" and "D."

W. S. ALEXANDER.

Subscribed and sworn to before M. J. Cleveland, a Notary Public, the 30th day of September, 1908.

EXHIBIT "B."

Sundry Expenses Incurred in Connection with Claim of A. and P. Sandoval.

1908.			
June 17th	Services A. P. Fuller, Los Angeles 4 days at $6.00		24.00
	Carfare, etc., A. P. Fuller		1.20
June 24th	Cost of telephone to Los Angeles		5.00
" "	" " " " "		3.00
June 24th	" " " from " "		7.00
June 26th	Time and expenses C. D. Galbraith on trip San Francisco to Nogales and return, Railroad fare	79.20	
	Pullman fare	13.50	
	Hotel, 11 days at $5.00	55.00	
	Services C. D. Galbraith, 11 days at
136 $7.00	14.00	
			224.70

July	7th	Time and expenses of C. D. Galbraith in Los Angeles Hotel, 2 days at $5.00.	10.00	
		Services C. D. Galbraith, 2 days at $7.00	14.00	
				24.00
July	14th	Court Clerk's fee paid by Mr. Galbraith		5.00
July	21st	Expenses J. H. Borland to Los Angeles and return. Railroad fare	28.00	
		Pullman	5.00	
		Hotel at Los Angeles	19.85	
		Meals en route	8.30	
				61.15
July	30th	Sundry telegrams as per detail bill attached from June 13th to July 30th–08		82.20
Aug.	5th	Fee to Eugene S. Ives		100.00
Aug.	10th	Paid Ganz & Company acct. telegrams telephone		7.25
				$544.50

Other expenses have been incurred for fees and expenses of Attorney Frank H. Hereford, for which bills have not yet been rendered.

EXHIBIT "C."

"LOS ANGELES, CAL., *June* 24, 1908.

At sight, pay to the order of United States Fidelity & Guaranty Co., $11,484.93, eleven thousand four hundred and eighty four and 93/100 dollars. With exchange and collection charges. Value received and charge to account of Frank M. Kelsey, agent, per Catesby C. Thom. To United States Fidelity & Guaranty Co., c/o Borland & Johns, Union Trust Building, San Francisco, Calif.

(Stamped on face:) Mercantile Trust Company of San Francisco. Jun. 25, 1908. Paid Collection Desk. The United States
137 Fidelity and Guaranty Co. Paid Jun. 25, 1908. By Ck. on Un. Tr. Co. W. S. A.

(Endorsed on back:) United States Fidelity and Guaranty Company, by Catesby C. Thom, Attorney in fact. Pay to the order of any bank or banker. All previous endorsements guaranteed. Metropolitan Bank & Trust Co., Los Angeles, Cal.

EXHIBIT "D."

No. 351.

We Will Bond You.

Contract, Fidelity, Judicial, Burglary.

The United States Fidelity and Guaranty Company,
Borland & Johns, Managers,
Union Trust Building.

$11484# SAN FRANCISCO, *Jun.* 25, 1908.

Pay to the order of Mercantile Trust Co. $11,484.93, Eleven thousand four hundred & eighty four /93 Dollars.

THE UNITED STATES FIDELITY
AND GUARANTY CO.
W. S. ALEXANDER, *Cashier.*
H. V. D. JOHNS, *Manager.*

To Union Trust Company, of San Francisco.

(Stamped on face:) Certified June 25, 1908. Good for $11,484.93/100 when properly endorsed. Payably through San Francisco Clearing House, Union Trust Co., of San Francisco.
138 Charles du Pare, Cashier; Jas. C. Gleason, Teller.
(Stamped on back:) F. D. Arnold. Pay only through Clearing House Jun. 26, 1908. 26 Mercantile Trust Company of San Francisco.

And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause, copies of Interrogatories propounded to Samuel L. Pattee and his answers thereto, which reduced to questions and answers are in words and figures following, to-wit:—

(Title of Court and Cause.)

Interrogatory No. 1. State your name, age, residence and occupation.

Answer. Samuel L. Pattee; 39; Tucson, Arizona; lawyer.

Interrogatory No. 2. Are you associated with any member of the bar at Tucson, Arizona? If so, state with whom, and for how long?

Answer. I am. Mr. Eugene S. Ives, attorney-at-law, Tucson, Arizona; for about two years last past.

Interrogatory No. 3. Are you acquainted with Joseph H. Kibbey, Governor of the Territory of Arizona, and if so, how long have you known him?

Answer. I am acquainted with Joseph H. Kibbey, Governor of Arizona, and have known him for a number of years.

139 Interrogatory 4. Were you in the city of Phoenix, Arizona on the 19th day of June, 1908; and if so, for what purpose did you go to said city?

Answer. I was in Phœnix on the 19th day of June, 1908, and I went there for the purpose of calling the attention of the Governor of Arizona to the failure of the United States Fidelity and Guaranty Company to pay a judgment rendered against A. Sandoval and P. Sandoval and the United States Fidelity and Guaranty Company by the supreme court of the Territory of Arizona, and to request the Governor to take steps to terminate the right of said United States Fidelity and Guaranty Company to do business in Arizona for the non-payment of said judgment within thirty days.

Interrogatory 5. If in answer to the last preceding interrogatory you state you were in the city of Phœnix, Arizona, on the day mentioned therein, state what, if anything, you did, or what steps you took, if any, with reference to the collection of a judgment in favor of Epes Randolph against A. Sandoval and P. Sandoval and the above-named plaintiff as surety upon the appeal bond given by said Sandovals, on appeal to the supreme court of the Territory of Arizona.

Answer. I first procured from the Clerk of the supreme court of the Territory of Arizona, a certified copy of the judgment
140 referred to, and a certificate that no appeal, writ of error or supersedeas from said judgment had been filed in his office. I hand to the Notary Public the certified copy of the judgment and the certificate so procured, to be marked Exhibits "A" and "B" respectively, and made a part of this deposition. I had previously prepared a petition to the Governor asking that the authority of said United States Fidelity and Guaranty Company to do business in Arizona be revoked; and I hand said original petition to the Notary to be marked Exhibit "C" and to be made a part of this record. Upon procuring the certificate from the clerk of the supreme court I went to the office of the Governor and presented to him all these papers, and stated the purpose of my calling upon him, and requested that he take steps to cancel the authority of such company to do business within this Territory unless said judgment were promptly paid.

Interrogatory 6. State fully what was done by the Governor of the Territory of Arizona or by anyone else under his direction, with reference to matters directed to the Governor's attention by yourself, at which the collection of the judgment mentioned in the preceding interrogatories; and at whose suggestion and upon whose request the same were done.

Answer. The Governor examined the papers presented to him and he said to me that he did not desire to act hastily in the matter,
and asked that I refrain from filing a formal complaint in
141 his office until he could advise the company and see what excuse they might give for the non-payment of the judgment. I then asked the Governor if he would send a telegram to the company in such terms as he might think proper to call their attention to their failure to pay the judgment. The Governor thereupon wrote a proposed draft of a telegram, which he handed to me for examination. I examined the proposed telegram and returned it to the Governor, and he thereupon called his private secretary, Mr. J. F. Cleaveland, and handed him the proposed telegram, to be

copied in the proper form. Mr. Cleaveland thereupon made copies of the telegram so prepared by the Governor, which were by him handed to the Governor and myself for examination. Shortly after Mr. Cleaveland and myself left the Governor's office and before leaving the office I stated to the Governor that a formal complaint would be filed unless satisfactory assurance was received from said United States Fidelity and Guaranty Company that the judgment would be promptly paid. Mr. Cleaveland and myself went to the office of the Western Union Telegraph Company in the Adams Hotel Building, at Phoenix, and he handed to the person in said office the telegram so prepared. All these steps were taken by the Governor and his secretary upon my suggestion and at my request.

142 Interrogatory 7. State on whose behalf you were acting in doing the various things mentioned in your answers to the previous interrogatory?

Answer. I was acting on behalf of Epes Randolph at the request of Mr. Eugene S. Ives, his attorney.

SAMUEL L. PATTEE.

Subscribed and sworn to before Josie B. Henderson, a Notary Public, on the 24th day of September, 1908, at Tucson, Arizona.

EXHIBIT "A."

In the Supreme Court of the Territory of Arizona.

No. 1028.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

This cause having been heretofore submitted, and by the Court taken under advisement and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be and the same is, hereby affirmed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from A. Sandoval and P. Sandoval, appellants herein, and United States Fidelity and Guaranty Company of Baltimore, Maryland, surety on supersedeas bond, the sum of ten thousand five hundred twenty-eight and 33/100 ($10,528.33) Dollars, with interest thereon at the rate of six per cent. (6%) per annum from April 12, 1907, until paid.

143 It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from the appellants herein, A. Sandoval and P. Sandoval, and Anton Proto and Wm. Schuckmann, sureties on cost bond herein, his costs in this court, taxed at thirty-seven and 10/100 ($37.10) dollars, together with his costs in the court below in this cause incurred.

Supreme Court, Territory of Arizona, *ss:*

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the foregoing to be a full, true and correct copy of the order and judgment made and entered by said Supreme Court on the 27th day of March A. D., 1908, in the case of A. Sandoval and P. Sandoval, appellants, vs. Epes Randolph, appellee.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of June, A. D., 1908, at Phœnix, Arizona.

[SEAL.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona,
By ANGIE B. PARKER,
Deputy.

EXHIBIT "B."

In the Supreme Court of the Territory of Arizona.

No. 1028.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that no appeal, writ or error,
144 or supersedeas, from the judgment rendered in the said Supreme Court on the 27th day of March, 1908, in the said above entitled cause, has been filed in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of June, A. D., 1908, at Phœnix, Arizona.

[SEAL.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona,
By ANGIE B. PARKER,
Deputy.

EXHIBIT "C."

Hon. Joseph H. Kibbey, Governor, Phœnix, Arizona:

The petition of Epes Randolph respectfully represents:

1. That he is a resident and citizen of the county of Pima and Territory of Arizona and has been such for several years last past.

2. That on the 26th day of November, 1906, your petitioner brought an action in the district court of the second judicial district of the Territory of Arizona, in and for the county of Santa Cruz against A. Sandoval and P. Sandoval to recover the sum of Ten

thousand dollars. That the defendants appeared in said ac-
145 tion and answered therein and such proceedings were had therein, that the said cause was duly tried before said court on the 10th day of April, 1907, and on the 11th day of April, 1907, judgment was rendered by said court in favor of your petitioner and against the said A. Sandoval and P. Sandoval and each of them, and judgment was thereupon entered in favor of your petitioner and against the said defendants and each of them for the sum of $10,528.33, and the further sum of $138, costs of said action.

3. That on said 11th day of April, 1907, the motion for a new trial in said action was duly heard, and by said court denied, and thereupon said defendants gave notice of appeal to the Supreme Court of the Territory of Arizona from said judgment.

4. That thereafter the said defendants for the purpose of perfecting said appeal and of staying the execution of said judgment, duly executed and filed with the clerk of said district court a bond given by the said A. Sandoval and P. Sandoval as principals, and The United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, and duly authorized to transact business in the Territory of Arizona, under and pursuant to the statutes of said Territory relating to surety companies, as surety, conditioned as provided by paragraph 1510 of the Revised Statutes of the Territory of Arizona, 1901.

146 5. That said appeal came on duly to be heard before the supreme court of the Territory of Arizona, at the January Term thereof, and was duly argued before the said court, and thereafter and on the 27th day of March, 1908, the said supreme court did render its judgment on said appeal in all things affirming the judgment of the said district court therein appealed from and did adjudge and decree in and by said judgment that your petitioner Epes Randolph do have and recover of and from the said A. Sandoval and P. Sandoval and each of them, and the said United States Fidelity and Guaranty Company the said sum of $10,528.33, with interest thereon at six per cent. per annum from the date of said judgment.

6. That thereafter the said A. Sandoval and P. Sandoval, appellants in said cause, filed a motion for a rehearing in said supreme court, and that said motion was thereafter duly heard by said court, and that the same was on the 19th day of May, 1908, in all things denied; and thereafter and in due course of procedure the mandate of said supreme court was duly issued and said cause was remanded to the said district court in and for Santa Cruz County.

7. That more than thirty days have elapsed since the rendition of the judgment of said supreme court as aforesaid, and since the denial of said motion for a rehearing, and the judgment of
147 said supreme court rendered against the said United States Fidelity and Guaranty Company upon the said appeal bond and as surety thereon, and that no appeal, writ of error or supersedeas has been taken from the said judgment of the supreme court, but the same remains in full force and effect; and that said judgment is not, nor has any part thereof been paid.

8. That said A. Sandoval and P. Sandoval are non-residents of the Territory of Arizona, and your petitioner knows of no property belonging to them or either of them within the said Territory subject to execution, out of which the said judgment with interest and costs can be made, and that your petitioner is depending for the collection of his judgment upon the payment of the said judgment against the said United States Fidelity and Guaranty Company as surety upon said bond.

9. That on the 30th day of May, 1908, after waiting a reasonable time for payment of said judgment, your petitioner, through his attorneys, notified the said United States Fidelity and Guaranty Company of the rendition of said judgment, and of the amount thereof, and the amount of the costs with interest thereon, and demanded payment thereof, but notwithstanding such judgment, no part of the same has ever been paid.

10. That the amount now due upon said judgment, principal and interest, is the sum of $11271.73.

11. That your petitioner annexes hereto a certified copy
148 of the judgment of said supreme court and certificate from the clerk of said supreme court that no appeal, writ of error or supersedeas has been taken from said judgment.

Wherefore, your petitioner prays that Your Excellency determine that such United States Fidelity and Guaranty Company has forfeited all its right to do business within the Territory of Arizona, and that the authority of said United States Fidelity and Guaranty Company to transact any new business within said Territory of Arizona be revoked, and such company excluded from the transaction of business within said Territory.

Dated June 19th, 1908.

EPES RANDOLPH,
By EUGENE S. IVES AND
S. L. PATTEE,
His Attorneys.

And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause, Plaintiff's certain Exhibit "E" in words and figures following, to-wit:

149 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz.

EPES RANDOLPH, Plaintiff,
vs.
A. SANDOVAL and P. SANDOVAL, Defendants.

Bond on Appeal from a Money Judgment.

Whereas the defendants in the above entitled action have appealed to the Supreme Court of the Territory of Arizona from a judgment rendered and entered against them in said action in the District

Court of the said County of Santa Cruz in favor of the plaintiff in said action on the 11th day of April A. D. 1907, for Ten Thousand Five Hundred and Twenty-eight Dollars and thirty-three cents Gold Coin of the United States of America, and for costs of suit, and from the whole thereof, and also from the order refusing the defendants a new trial made and entered in the minutes of said Court on April 11th A. D. 1907.

And whereas defendants have given a bond for the Plaintiff's costs in said action, which bond has been approved and filed among the proceedings in said action.

And whereas the appellants are desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally under-
150 take and promise, and do acknowledge ourselves further, jointly and severally bound in the sum of Twenty-one Thousand and One Hundred Dollars, Gold Coin of the United States of America, being double the amount named in said judgment, conditioned that said appellants shall prosecute their appeal with effect, and in case the judgment of the appellate court shall be against them that they will perform its judgment, sentence or decree, and pay all such damages as may be awarded against them upon the appeal.

Witness the hands and seals of said principals and sureties this 5th day of June, A. D. 1907.

As Principal, P. SANDOVAL & CO., [SEAL.]
By P. SANDOVAL. [SEAL.]
As Surety, UNITED STATES FIDELITY AND GUARANTY CO.
BRACEY CURTIS, *Attorney-in-Fact.*
EB WILLIAMS, [SEAL.]
Attorney-in-Fact.

TERRITORY OF ARIZONA,
County of Santa Cruz, ss:

Bracey Curtis being duly sworn deposes and says that he is an attorney in fact of the United States Fidelity and Guaranty Company of Baltimore, Maryland, that said Company is worth the amount for which it has bound itself as security on the foregoing bond, over and above its liabilities.

BRACEY CURTIS.

151 Sworn and subscribed before me this 5th day of June, 1907.

[SEAL.]

EB. WILLIAMS,
Notary Public.

My commission expires January 30, 1908.

Endorsement: No. 482. In the District Court of the 2nd Judicial District of the Territory of Arizona in and for the County of Santa Cruz. Epes Randolph, P'ff vs. A. Sandoval and P. Sandoval, Dfts.

Bond on Appeal. Filed and Approved May 5th, 1907. Allen T. Bird, Clerk.

Endorsement: No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval et al., vs. Epes Randolph. Supersedeas Bond. Filed Nov. 9, 1907. F. A. Tritle, Jr., Clerk. By Angie B. Parker, Deputy.

TERRITORY OF ARIZONA,
County of Santa Cruz, ss:

I, Allen T. Bird, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Santa Cruz do hereby certify that the above and foregoing two typewritten pages are a full, true and correct copy, and the whole thereof, with the endorsements thereon, of the Supersedeas Bond in the above entitled case and cause, as filed in my office.

Witness my hand and the Seal of said Court, in the Territory and County above written, on this 16th day of September, A. D. 1908.

[SEAL.] ALLEN T. BIRD,
Clerk of said Court.

152 And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court, in said entitled cause, a certain Plaintiff's Exhibit "A" a copy of which, with the exception of the certificate attached thereto of J. F. Cleaveland, Private Secretary to the Governor of Arizona, is omitted by direction of Attorney for Appellant.

A copy of said certificate here follows:

OCTOBER 2, 1908.

I, J. F. Cleaveland, Private Secretary to the Governor of Arizona, do hereby certify: That the files of the office of the Governor, at the Capitol, in the City of Phoenix, County of Maricopa, Territory of Arizona, show that on the 15th day of October, 1903, there was filed in the *siad* office a printed copy of the Charter of the United States Fidelity & Guaranty Company, of Baltimore, Maryland, said printed copy having annexed thereto a certificate signed by Lloyd Wilkinson, Insurance Commissioner of Maryland that said copy is a true and complete copy of the charter of the said United States Fidelity & Guaranty Company; that on the said 15th day of October, 1903, the Governor of Arizona, issued in writing his authority to the said United States Fidelity & Guaranty Company to transact busi-
153 ness in Arizona. That the foregoing 29 pages of typewritten matter are true, full and correct copies of the certified copy of the charter of the United States Fidelity and Guaranty Company of Baltimore, Maryland; of the financial statement of the said company for the quarter ending June 30th, 1903, which was filed at the time of the filing of the certified copy of charter; of the financial statement of the said company for the quarter ending March 31st, 1908; and of the financial statement of the said company for the quarter ending June 30th, 1908; and I further certify that the

authority so granted by the Governor of Arizona to the said United States Fidelity and Guaranty Company has not been revoked.

In Witness Whereof, I have hereunto set my hand at the office of the Governor of Arizona, at Phœnix, Maricopca County, Arizona, this 2nd day of October, A. D. 1908.

J. F. CLEAVELAND,
Private Secretary to the Governor of Arizona.

EXHIBIT "F."

"METROPOLITAN BANK AND TRUST CO.,
LOS ANGELES, CAL., *June* 24, 1908.

Pay to Epes Randolph or bearer, $11,484.93. Eleven thousand, four hundred and eighty-four 93/100 dollars.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
Per CATESBY C. THOM.

154 (Stamped on face:) "Metropolitan Bank & Trust Co., Los Angeles, Cal., Paid Jun- 25, 1908."

(Endorsed on back:) "Epes Randolph, per Eugene S. Ives, Att'y in fact. For deposit Eugene S. Ives."

And on the same day, to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court in said entitled cause a certain Exhibit "1" in words and figures following, to-wit:

Know All Men By These Presents, That I, Epes Randolph, of the City of Tucson, Pima County, Territory of Arizona, am held and firmly bound unto the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, in the penal sum of twenty thousand ($20,000.00) dollars for which amount I bind myself, my heirs, executors, administrators and assigns firmly by these presents. The condition of the above obligation is such that

Whereas, The said Epes Randolph did on or about the 11th day of April, 1907, recover a certain judgment against A. Sandoval and P. Sandoval for the sum of ten thousand, five hundred and twenty-eight dollars and thirty-three cents ($10,528.33) in the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Santa Cruz, and

Whereas, the said A. and P. Sandoval did appeal from the said judgment of the Supreme Court of the Territory of Arizona,
155 and upon such appeal did make and file their supersedeas bond, upon which said supersedeas bond the said United States Fidelity and Guaranty Company, obligee herein, was surety for the said A. and P. Sandoval; and

Whereas, the said judgment of the District Court was duly and on

or about the month of March, 1908, affirmed by the said Supreme Court of the Territory of Arizona, and the said Supreme Court *of the Territory of Arizona, and the said Supreme Court* did render judgment against the said A. and P. Sandoval and the said corporation, obligee herein, for the amount of said judgment rendered by the District Court, with interest and costs; and

Whereas, the said corporation, obligee herein, did on the 24th day of June, 1908, pay to the said obligor Epes Randolph the sum of eleven thousand, four hundred and eighty-four dollars and ninety-five cents ($11,484.95), being the full amount due upon the said judgment of the Supreme Court, with interest and costs to said date of payment; and

Whereas, the said A. and P. Sandoval, on the 24th day of June, 1908, were proceeding to appeal from the said judgment of the Supreme Court of the Territory of Arizona to the Supreme Court of the United States, but on said date had not perfected their appeal, and

Whereas, the said A. and P. Sandoval have at the date of
156 these presents duly appealed to the Supreme Court of the United States from the said judgment;

Now, therefore, if the said Supreme Court of the United States should affirm the said judgment of the Supreme Court of the Territory of Arizona, or if in the event that the Supreme Court of the United States should reverse the said judgment of the Supreme Court of the Territory of Arizona, the said Randolph should refund to the said The United States Fidelity and Guaranty Company the said sum of eleven thousand, four hundred and eighty-four dollars and ninety-five cents ($11,484.95) with interest from the 24th day of June, 1908, then this obligation to be void, otherwise to remain in full force and effect.

It Is Furthermore Agreed, that the said Epes Randolph in further consideration for the payment to him of the said sum of $11,484.95 as aforesaid, and as collateral security for this bond, will deposit, and does herewith deposit, with the said The United States Fidelity and Guaranty Company, obligee, twenty-five thousand shares of the capital stock of Huntington Beach Company, a corporation organized under the laws of the state of California, with the right to the said The United States Fidelity and Guaranty Company, in the event that the said Randolph should fail to pay to the said company the full sum of $11,484.95, with interest as aforesaid, within ninety
157 days after the reversal of the said judgment of the Supreme Court of the Territory of Arizona by the Supreme Court of the United States, to sell the said stock or so much thereof as may be necessary at public or private sale, upon thirty days' notice to the said Randolph; and to apply the proceeds thereof to the payment of the said sum of $11,484.95, with interest; the balance, if any, to be repaid to the said Randolph.

And It Is Further Agreed, that the said stock shall be returned by the said The United States Fidelity and Guaranty Company to the said Randolph upon the affirmance of the said judgment of the Supreme Court of the Territory of Arizona by the Supreme Court of

the United States, or in the event of the dismissal of the said appeal to the Supreme Court of the United States.

It is Further Agreed, that the said Randolph shall have the right to withdraw the said stock deposited herewith as collateral by the substitution therefor either of other collateral satisfactory to James H. Borland, or whoever may be his successor as manager of the United States Fidelity and Guaranty Company, or of a bond with individual sureties similarly satisfactory to the said Borland or his successor.

In Witness Whereof, the said Randolph has hereunto set his hand and seal at the City of Tucson, Pima County, Territory of Arizona, on this, the 31st day of July, 1908.

(Signed) EPES RANDOLPH.

(Certificate of Acknowledgment.)

And on the same day to-wit: the twenty-sixth day of December, 1908, there was filed in the clerk's office of said court, in said entitled cause, a certain Exhibit "2," in words and figures following, to-wit:

158 EXHIBIT "2."

In the Supreme Court of the Territory of Arizona.

No. 1028.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

Appeal from the District Court of Santa Cruz County.

Hon. Frederick S. Nave, Judge.

Appearances: A. Orfila and Eb. Williams, Attorneys for Appellants. Eugene S. Ives, S. L. Pattee and S. V. McClure, Attorneys for Appellee.

An action was brought in the District Court of Santa Cruz County by the appellee against the appellants for a sum of money alleged to have been paid by the appellee and his assignor, L. Lindsay, to the appellants for the purchase of the San Francisco Mine in the State of Sonora, Republic of Mexico, by the appellants as the agents of the appellee, and his assignor, Lindsay. From a decision for the plaintiff, the defendants appealed.

The facts found by the trial Court before whom the case was tried, without a jury, are as follows:

"In or about the spring of 1905 the defendants, A. Sandoval and P. Sandoval, entered into a certain agreement with the plaintiff, and one Lycurgus Lindsay, whereby the defendant agreed that they, on behalf of the said plaintiff, and the said Lindsay, would
159 undertake to purchase for them a certain mining claim called the San Francisco Mine in the Altar Mining District,

in the State of Sonora, Republic of Mexico, at the lowest possible price.

Thereafter the said defendants, in pursuance of such agreement, and on behalf of the said Lindsay and this plaintiff, did purchase the said mining claim from the owner thereof for the full consideration of twenty thousand dollars Mexican silver, and that the defendant P. Sandoval, as co-partner of the defendant A. Sandoval, did thereupon obtain a deed of the said mining claim from the original owners thereof, and did pay therefor the sum of twenty thousand dollars Mexican silver, and no more; and the said defendants did thereupon, and in further pursuance of said agreement procure the said P. Sandoval to convey the said mining claim to one H. S McKay, who was the agent of the plaintiff, and of the said Lindsay; and the said Lindsay in pursuance of said agreement, and in the belief that the defendants had paid for the said mine the said sum of twenty thousand dollars American gold, did pay to the defendants the said sum of twenty thousand dollars American gold.

The plaintiff and the said Lindsay paid the said sum of twenty thousand dollars in gold in three separate installments, the
160 last thereof being paid on the 25th day of May, 1906, for the sum of twelve thousand dollars American gold.

The said sum of twenty thousand dollars Mexican silver paid by the defendants to the original owners of said mining claim was worth in American gold the sum of ten thousand dollars at the time the said payment was made.

The said Lycurgus Lindsay prior to the commencement of this action, duly assigned his claim against the defendants arising out of the aforesaid transaction to the plaintiff for a valuable consideration."

The first error assigned by the appellant is that the complaint does not state facts sufficient to constitute a cause of action, and is subject to a general demurrer. No general demurrer was interposed in the lower Court prior to the trial, hence no error was committed by the trial Court in permitting the case to come to trial. It would be error to render a judgment on a complaint so fatally defective as to be insufficient to support the judgment, but such error is not assigned. However, if the record should disclose that the complaint was not sufficient to support a judgment, the rendition of a judgment thereon, would constitute fundamental error as manifest in the record, and the judgment would be reversed in the Appellate Court, even if the point was not raised by the appellant. It
is urged by the appellant that this is an action for fraud,
161 and in as much as the complaint does not contain the allegations of facts constituting fraud that are essential in a complaint for fraud, it fails for that reason to state facts sufficient to constitute a cause of action. We cannot agree with the counsel for the appellants that the action is one of fraud. It is true that the complaint contains the words "with intent to deceive and defraud," but in addition to this charge, the complaint alleges, (omitting the part not pertinent to this question), "the defendants agreed, as agents for Lindsay and plaintiff * * * to buy a certain mine

for the use and benefit of the said Lindsay and the plaintiff at the lowest possible price." "That thereafter * * * the said defendants did * * * as agents aforesaid * * * purchase said claim * * * and pay therefor the sum of twenty thousand dollars Mexican silver." "And the owners of said claim did * * * convey the said claim to the defendants * * * and the said conveyance was accepted by the said defendants for the use and benefit of the said Lindsay and this plaintiff." "That the defendants * * * did report to Lindsay and the plaintiff that they had agreed to pay the owners of said mine twenty thousand dollars American gold therefor, and said sum was the lowest sum for which they could purchase the same from said owners, and that Lindsay and plaintiff, relying upon said statements of defendants, did pay to the said defendants the sum of twenty thousand dollars American gold."

162 "That at the date when the defendants paid the said sum of twenty thousand dollars Mexican silver to the owners of said claim, the said twenty thousand Mexican silver was worth the sum of nine thousand, six hundred dollars gold, and no more, and that by reason of the foregoing facts the defendant became indebted to the said Lindsay and the plaintiff in the sum of ten thousand, four hundred dollars gold, and that they have not paid the same, or any part thereof, though often requested so to do."

The facts thus alleged in the complaint are sufficient to constitute a cause of action without the necessity of alleging fraud, that being the case, the allegation of fraud that the appellant characterizes as defective and insufficient having been pleaded as a matter of inducement only, is immaterial, and may be treated as surplusage, and the complaint, independent thereof, is fully sufficient to sustain an action of debt for money had and received.

Another error assigned is that the Court erred in overruling the demurrer of defendants. This demurrer was urged upon the ground that the Court had no jurisdiction over the persons of the defendants, or the subject matter of the action. The record shows jurisdiction over the persons of the defendants acquired both by service of the summons, and the copy of the complaint and by a general appearance entered by their answers filed February 12, 1908.

163 As to the jurisdiction of the Court over the subject matter, this is a transitory action, and may be brought in any county where the defendants can be served with process. In Mostyn v. Fabrigas, 1 Cook, 161, it is held that if "A" becomes indebted to "B" in Paris, an action may be maintained against "A" in England if he is there found. And in this case Lord Mansfield said: "Any action which is transitory may be laid in any county in England, though the matter arises beyond the seas." This doctrine in respect to transitory actions has been repeatedly affirmed in the Courts of the United States. 1 How., U. S. 241; 13 How., U. S. 115.

At the conclusion of the plaintiff's evidence, the defendants asked leave to file an amended answer, setting up the statutes of limita-

tions. The plaintiff refused consent to the amendment, and the Court denied the application. This denial is assigned by the appellant- as error.

After the trial of a case has begun, the Court may, in its sound discretion, permit or refuse an amendment to the pleadings. This action, like any other that rests in the discretion of the trial Court, will not be reviewed on appeal unless it is plainly shown that the lower Court has abused its discretion. United States v. Atherton, 102 U. S. 372.

The statutes sought to be pleaded by the proposed amend-
164 ment was the limitation provided by Act 16, Laws of 1903. The actions barred under this statute by the lapse of more than one year from the discovery of the acts constituting the fraud are those brought to obtain equitable relief, which are based wholly on fraud, and in which no relief can be granted unless fraud be proven.

This action is not a bill in equity for relief on the ground of damage from fraud, but is a suit at law to recover money alleged to have been advanced to defendants as agents to pay the price of a mine purchased by them for plaintiffs and Lindsay as principals. The complaint alleges that twenty thousand dollars gold was furnished defendants, and only nine thousand, six hundred dollars was paid by them, whereby they became indebted to the plaintiff in the sum of ten thousand, four hundred dollars gold, which was not applied to the purpose for which it was furnished, and remained in their hands, the property of their principal.

Before application to amend was made, it was established by undisputed evidence that of the money furnished defendants, twelve thousand dollars, which included all the excess over the price actually paid (for which excess this action was brought) was furnished in May, 1906. No cause of action arose prior to the receipt of the money by defendants, May 25, 1906. This action was begun on the 26th day of November, 1906, six months after the statute
165 began to run, consequently, it is apparent that in refusing to permit the defendants to amend and plead the statute of limitations, the court deprived them of no defense.

The appellant- assigned as error the findings of fact and conclusions of law of the trial Court. The evidence is conflicting. There is abundant testimony to warrant the findings of the Court. It is the rule that the Appellate Court will not disturb the findings of fact of the trial Court based upon conflicting evidence when they are supported by any substantial testimony. The conclusions of law expressed by the trial Court are proper, in connection with the facts as found.

The appellee calls attention to Section 23 of Chapter 74 of the Laws of 1907 of the Territory of Arizona, and urged the enforcement of the penalty therein provided. We do not assume the responsibility of holding that the appellant- *was* in this case actuated in taking the appeal solely by the desire to delay, and therefore will not impose the penalty.

The judgment of the trial Court is affirmed.

FLETCHER M. DOAN,
Associate Justice.

We concur:

EDWARD KENT,
Chief Justice.
RICHARD E. SLOAN,
Associate Justice.
166 JOHN H. CAMPBELL,
Associate Justice.

(Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. A Sandoval, et al. vs. Epes Randolph. Opinion, recorded book 7, page- 405-411. Filed March 27, 1908. F. A. Tritle, Jr., Clerk.

Allowance of Appeal to the Supreme Court of the United States.

In the Supreme Court of the Territory of Arizona.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

The above named appellants, A. Sandoval, and P. Sandoval, conceiving themselves aggrieved by the judgment of the Supreme Court of the Territory of Arizona made and entered on the 27th day of March, 1908, in the above entitled cause, and by order of Said Supreme Court of the Territory of Arizona denying a re-hearing of said cause made and entered on the 18th day of May, 1908, and the record in said cause showing the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, do hereby appeal from the said judgment and decree, and the order denying the re-
167 hearing, to the Supreme Court of the United States for the reasons as specified in the assignment of errors, which is filed herewith, and prays that this appeal be allowed, and that the transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

A. ORFILA,
EB. WILLIAMS,
Attorneys for Appellants.

Dated this 13th day of June, 1908.

The foregoing appeal is allowed, and the judgment of the Supreme Court of the Territory of Arizona, and the judgment of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Santa Cruz, in said cause, is stayed, upon said appellants' filing their supersedeas bond in the sum of twenty

thousand dollars to be approved by any Justice of the Supreme Court of the Territory of Arizona.

Dated this 20th day of June, 1908.

JOHN H. CAMPBELL,
Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval, and P. Sandoval, appellants, v.
168 Epes Randolph, appellee. Allowance of appeal to the Supreme Court of the United States. Filed June 22, 1908.
F. A. Tritle, Jr., Clerk.

In the Supreme Court of the United States.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

Know all men by these presents, That we, A. Sandoval and P. Sandoval, as principals, and Edward Titcomb of the City of Nogales, Arizona, and Frederick Ronstandt and Rosario Brena, both of the City of Tucson, Arizona, as sureties, are held and firmly bound unto Epes Randolph in the full and just sum of twenty thousand ($20,000) dollars to be paid to the said Epes Randolph, his attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators jointly and severally firmly by these presents, sealed with our seals, and dated this 8th day of July in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at the session of the Supreme Court of the Territory of Arizona, in an action in said Court then and there pending between Epes Randolph as plaintiff therein, and A. Sandoval
169 and P. Sandoval as defendants therein, a judgment was rendered and entered in said Supreme Court of the Territory of Arizona, affirming a certain judgment of the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Santa Cruz, which said judgment of said District Court was made and entered on the tenth day of April, A. D. 1907, in favor of said appellee, Epes Randolph, wherein and whereby it was ordered, adjudged and decreed that said appellee, Epes Randolph, recover of said appellants, A. Sandoval and P. Sandoval, and each of them, the sum of ten thousand five hundred and twenty-eight dollars and thirty-three cents (10,528.33) and together with interest thereon at the rate of six per cent per annum from the 10th day of April, A. D. 1907, and the costs of said action; and,

Whereas, the said appellants, A. Sandoval and P. Sandoval have obtained an allowance of an appeal to the Supreme Court of the United States, and a stay of the said judgment of the Supreme Court of the Territory of Arizona, and of the said judgment of the District

Court of the second Judicial District of the Territory of Arizona in and for the County of Santa Cruz, in said cause by order of the Honorable John H. Campbell, Justice of the Supreme Court of the Territory of Arizona, upon appellants' filing herein a bond in the sum of twenty thousand (20,000) dollars as and for a cost
170 and supersedeas bond in said cause; and whereas, the citation directed to the said Epes Randolph is about to be issued, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia.

Now, the condition of the above obligation is such that, if the said A. Sandoval and P. Sandoval shall prosecute their said appeal to effect, and shall answer all costs, judgment and damages, if they fail to make their plea good, then the above obligation to be void, otherwise, to remain in full force.

P. SANDOVAL. [SEAL.]
A. SANDOVAL. [SEAL.]
By P. SANDOVAL. [SEAL.]
Attorney in Fact.
FREDERICK RONSTADT. [SEAL.]
ROSARIO BRENA. [SEAL.]
EDWARD TITCOMB. [SEAL.]

TERRITORY OF ARIZONA,
County of Pima, ss:

Frederick Ronstadt and Rosario Brena, sureties upon the within bond for appeal, being first duly sworn, each for himself, and not one for the other, deposes and says, that he is a resident and freeholder of the Territory of Arizona, and that he is worth the sum of twenty thousand dollars in property subject to execution within said Territory of Arizona, and not exempt under the laws of said
171 territory, and that he is worth the said amount over and above all his just debt and liabilities.

FREDERICK RONSTADT.
ROSARIO BRENA.

Subscribed and sworn to this 8th day of July, 1908.
(My commission expires Apr. 25, 1911.)

BESSIE McINERNAY,
[SEAL.] *Notary Public.*

TERRITORY OF ARIZONA,
Santa Cruz County, ss:

Edward Titcomb, surety upon the within bond on appeal, being first duly sworn, deposes and says, that he is a resident and freeholder of the Territory of Arizona, and that he is worth the sum of ten thousand dollars in property subject to execution within said territory of Arizona, and not exempt under the laws of said territory and that he is worth the said amount over and above all his just debts and liabilities.

EDWARD TITCOMB.

Subscribed and sworn to this 10th day of July, 1908.
(My commission expires May 27, 1912.)

GEORGE E. TRALLES,
[SEAL.] *Notary Public.*

The within bond approved by me this 14th day of July, 1908.

JOHN H. CAMPBELL,
Associate Justice Supreme Court of Arizona.

172 (Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval, et al., vs. Epes Randolph. Cost and Supersedeas bond. Filed July 15, 1908. F. A. Tritle, Jr., Clerk.

Here follows the Spanish version of general power of attorney, originally in the English language, and other Spanish proceedings thereto appertaining, from Aurelio Sandoval and his wife Luisa Parodi de Sandoval, of Los Angeles, California, to Prospro Sandoval of Nogales, Sonora, Mexico, a copy of which is omitted by direction of attorney for appellant-.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Epes Randolph, and to his attorney, Eugene S. Ives, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington within sixty days hereof, pursuant to an order allowing an appeal entered in the Clerk's office of the Supreme Court of the Territory of Arizona in that certain action numbered —, wherein A. Sandoval, and P. Sandoval are appellants, and Epes Randolph is appellee to show cause, if any there be, why the decree entered against the said appellants, as in said order allowing an appeal mentioned should
173 not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 18th day of July, A. D. 1908.

JOHN H. CAMPBELL,
Justice of the Supreme Court of the Territory of Arizona.

United States Marshal's Return.

UNITED STATES OF AMERICA,
District of Arizona, ss:

I hereby certify that I served the within citation on Epes Randolph, Appellee, on the 31st day of July, 1908, at the City of Tucson, County of Pima, in the Territory of Arizona, by then and there

delivering to the said Epes Randolph, Appellee, personally, a true copy of the within citation.

And I further certify that I served the within citation on the within named E. S. Ives, attorney for appellee, on the 22nd day of July, 1908, at the City of Tucson, and County of Pima, Territory of Arizona, by then and there delivering to S. V. McClure, personally, a true copy of the within citation: the said S. V. McClure, being the chief clerk in the office of the above named E. S. Ives, service upon the said S. V. McClure in the absence of E. S. Ives
174 being directed by F. H. Lyman, one of the attorneys for appellants.

Dated at Tucson, in the Territory of Arizona, this 31st day of July, 1908.

B. F. DANIELS,
U. S. Marshal,
By H. D. GUERRY, *Deputy.*

Marshal's fees: Two citations, $8.00.

(Endorsed:) Marshal's D'ket No. 183. No. —. In Supreme Court of the United States. A. Sandoval & P. Sandoval, appellants, vs. Epes Randolph, appellee. Citation. Filed August 4, 1908. F. A. Tritle, Jr., Clerk.

In the Supreme Court of the United States.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

Order Enlarging Time to File Record.

Now on this day, on motion of the appellants, by A. Orfila, of counsel, for the extension of time in which to file the transcript herein in the United States Supreme Court, it is ordered that the time heretofore granted in which to file said transcript in said Supreme Court of the United States be, and the same is hereby extended to December 15th, 1908, and that the return day specified in the
175 citation heretofore issued herein be extended to Dec. 15, 1908.

Dated this 8th day of September, 1908.

JOHN H. CAMPBELL,
Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 1028. In the Supreme Court of the Territory of Arizona. A. Sandoval et al. vs. Epes Randolph. Order enlarging time to file record. Service of a copy of within admitted this 8th day of Sept. 1908. Eugene S. Ives, Atty. for Appellee. Filed Sept. 10, 1908. F. A. Tritle, Jr., Clerk, by Angie B. Parker, Deputy.

In the Supreme Court of the Territory of Arizona.

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

Be It Remembered that heretofore, and on, to-wit: The 14th day of January, A. D. 1908, the same being one of the regular juridical days of the January Term, A. D. 1908, of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

176 At this day, it is ordered by the Court that the hearing of this cause be set for Jan. 23, 1908.

And afterwards, and upon, to-wit: The 23rd day of January, A. D. 1908, the same being one of the regular juridical days of the January Term, A. D. 1908, of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

At this day, upon motion of Mr. A. Orfila, it is ordered that Mr. Henry S. Van Dyke be entered as of counsel for appellants herein.

And afterwards, and upon, to-wit: The same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

At this day, upon motion of Mr. A. Orfila, attorney for appellants herein, it is ordered that he be granted ten days from January 24,

1908, in which to file reply brief, with leave to Mr. E. S. Ives, attorney for appellee, to file answer to appellant's reply brief if he so desires.

177 And afterwards, and upon, to-wit: The same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

This cause coming on at this time for hearing, was argued by Mr. E. S. Ives for appellee, and cause ordered submitted.

And afterwards, and upon, to-wit: The 27th day of March, A. D. 1908, the same being one of the regular juridical days of the January Term, A. D. 1908, of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 1028.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
EPES RANDOLPH, Appellee.

(*Judgment.*)

This cause having been heretofore submitted, and by the Court taken under advisement, and the Court having considered the same, and being fully advised in the premises: It is ordered that the judgment of the District Court be, and the same is, hereby affirmed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from A. Sandoval and P. Sandoval, appellants herein, and United States Fidelity and
178 Guaranty Company of Baltimore, Maryland, surety on supersedeas bond, the sum of ten thousand, five hundred twenty-eight and 33-100 (10,528.33) dollars, with interest thereon at the rate of six per cent (6) per annum from April 12, 1907, until paid.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from the appellant herein, A. Sandoval, and P. Sandoval, and Anton Proto, and Wm. Schuckmann, sureties on cost bond herein, his costs in this court taxed at thirty-seven and 10-100 ($37.10) dollars, together with his costs in the Court below in this cause incurred.

And afterwards, and upon, to wit: The 18th day of May, A. D. 1908, the same being one of the regular juridical days of the January Term, A. D. 1908, of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

It is ordered that the motion for re-hearing filed herein by appellants, be submitted.

And afterwards, and upon, to-wit: The 19th day of May, A. D. 1908, the same being one of the regular juridical days of the January Term, A. D. 1908, of said Court, the following order inter alia was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

179 No. 1028.

A. SANDOVAL et al., Appellants,
vs.
EPES RANDOLPH, Appellee.

It is ordered that the motion for re-hearing filed herein by appellants, and heretofore submitted be, and the same is, hereby denied.

Supreme Court, Territory of Arizona, *ss:*

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the foregoing to be a full, true and correct copy of the opinion petition for and allowance of appeal; supersedeas bond; exhibit in Spanish filed July 15th, 1908; citation; order enlarging time for filing record; and all orders and proceedings of said Court had and entered of record in the case of A. Sandoval and P. Sandoval, appellants, v. Epes Randolph, appellee, as the same remain on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 2nd day of October, A. D. 1908, at Phœnix, Arizona.

[SEAL.]

F. A. TRITLE, JR.,
Clerk Supreme Court of Arizona.
By ANGIE B. PARKER, *Deputy.*

And on the same day, to-wit: the twenty-sixth day of December, 1908, there were filed in the office of the clerk of said court in said entitled cause a Notice of Filing Agreement to Reporter's Tran-

script, a Statement Agreeing that Reporter's Transcript is Correct and a Notice that the Reporter's Transcript has been filed copies of which are omitted by direction of Attorney for Appellant.

180 And on to-wit: the eleventh day of January, 1909, come the appellants and appellee by their attorneys and file in the clerk's office of said Court in said entitled cause a certain Stipulation in words and figures following to-wit:

In the Supreme Court of the Territory of Arizona.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
THE UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Appellee.

Stipulation.

It is hereby stipulated between appellants and appellee that the appellants may have until the 26th day of January, 1909, in which to file *his* abstract of record and brief on appeal in the above entitled court; it being, however, further stipulated and understood that the above entitled cause shall be submitted at this, the January, 1909, term of the Supreme Court of the Territory of Arizona.

LAWLER, ALLEN, VAN DYKE AND JUTTEN,
FRED W. MORRISON,
By G. P. BULLARD,
Attorneys for Appellants.
EUGENE S. IVES,
S. L. PATTEE,
Attorneys for Appellee.

(Endorsed:) No. 1093. In the Supreme Court of the Territory of Arizona. A. Sandoval and P. Sandoval, Appellants, vs.
181 The United States Fidelity & Guaranty Company, a corporation, Appellees. Stipulation. Filed January 11, 1909. F. A. Tritle, Jr., Clerk.

And on the same day to-wit: the eleventh day of January, 1909, being one of the regular juridical days of the January term of said Court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1093.

A. SANDOVAL et al., Appellants,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee.

At this day, upon motion of Mr. Geo. P. Bullard, it is ordered by the Court that his name be entered as associate counsel for appellants.

And on to-wit: the twelfth of January, 1909, being one of the regular juridical days of the January term of said Court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

182 No. 1093.

A. SANDOVAL et al., Appellants,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee.

At this day, on motion of Mr. G. P. Bullard, attorney for appellants herein, it is ordered that appellants be granted until January 29, 1909, within which to file their brief.

And on the same day to-wit: the twelfth day of January, 1909, being one of the regular juridical days of the January term of said Court, 1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

No. 1093.

A. SANDOVAL et al., Appellants,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee.

At this day, it is ordered by the Court that appellee be granted ten days after the time allowed appellants herein for filing brief, within which to file its brief.

It is further ordered that this cause be submitted on briefs.

183 And on to-wit: the twentieth day of March, 1909, there was filed in the clerk's office of said Court in said entitled cause a certain Opinion in words and figures following, towit:

184 In the Supreme Court of the Territory of Arizona.

No. 1093.

A. SANDOVAL and P. SANDOVAL, Appellants,
versus
UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee.

Appeal from the District Court of Santa Cruz County.

Before Honorable Fletcher M. Doan, Judge.

Messrs. Lawler, Allen, Van Dyke & Jutten, Fred W. Morrison and G. P. Bullard, for Appellants.
Messrs. Eugene S. Ives and S. L. Pattee, for Appellee.

Opinion by

CAMPBELL, *J.*:

The complaint alleges that in April, 1907, one Epes Randolph recovered a judgment in the district court of Santa Cruz County, against the defendants in this action, A. Sandoval and P. Sandoval, for the sum of $10,528.33; that the defendants appealed from the judgment to this court, and applied to the United States Fidelity and Guaranty Company, a corporation (hereinafter referred to as the Guaranty Company), for a bond to be given on appeal to stay the judgment; that in the application for the bond, the defendants covenanted "to reimburse said company for any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature which said company shall or may for any
185 cause at any time sustain or incur or be put to for or by reason or in consequence of said company having entered into or executed said bond." That in consideration of the agreement, the Guaranty Company agreed to and did execute the bond on appeal, in a sum double the amount of the judgment and costs; that the judgment of the court below was affirmed by this court on or about March 27, 1908, and judgment rendered against the defendants, and against the Guaranty Company, for the amount recovered in the lower court, together with interest and costs; that a motion for rehearing was filed and denied on or about the 16th of May, 1908. That thereafter and prior to the 24th day of June, 1908, the plaintiff received notice from the Governor of the Territory of Arizona to the effect that the judgment of the Supreme Court of the Territory of Arizona had not been paid, that more than thirty days had elapsed from the rendition of the judgment, and to the effect that unless the judgment was paid or sufficient excuse for the non-payment thereof shown, the company would forfeit its rights to transact business as a surety company in the Territory of Arizona. That plaintiff promptly notified the defendants of said notice having been

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received by them from the Governor, and that defendants, on the 24th day of June, 1908, had wholly failed to pay the said judgment or to appeal therefrom to the Supreme Court of the United States, and that on the 24th day of June, 1908, plaintiff paid Randolph,
in satisfaction of the judgment and interest, the sum of
186 $11,484.95, and that upon said date said sum was due and owing upon the said judgment; that the plaintiff has paid for charges and expenses by reason and in consequence of having entered into and executed the bond the sum of $676.75; that the plaintiff has demanded of the defendants that they reimburse it in the said several sums paid out, and that the defendants have refused to reimburse the plaintiff in said sum or any part thereof; that in order to collect the said sum from the defendants, it has become necessary for the plaintiff to employ counsel to bring and institute this action and plaintiff has agreed to pay said counsel a reasonable fee and charge for the institution and prosecution of this suit, and as plaintiff is informed and believes, the reasonable cost of the institution and prosecution of this suit will be the sum of $3,000, be the same more or less. Judgment was demanded in the sum of $13,911.70, together with interest.

The defendants demurred to the complaint, on the ground that it does not state a cause of action, and by way of answer admit the facts set forth as to the judgment having been rendered, the application for and the execution of the bond, the appeal, the affirmance of the judgment by this court and the denial of the motion for a rehearing; deny that the plaintiff received the notice from the Governor of the Territory, as alleged, and also deny that the plaintiff paid to Randolph for the defendants, in satisfaction
187 of the judgment, any sum of money or that any sum of money was due upon the said judgment; and allege that after the judgment was affirmed in this court and the motion for rehearing denied a notice of appeal was duly given to the Supreme Court of the United States; that said cause was thereafter transferred to the Supreme Court of the United States, and is now pending in said court; that no execution has ever been issued upon said judgment, and that if the plaintiff in this case has ever paid the amount of said judgment, it has done so by reason of its own negligence, voluntarily, and not at the request of the defendants, or by any order of the court, or in satisfaction of any judgment.

The cause was tried to the court without a jury, and resulted in a judgment for $14,683.25 and costs, in favor of the Guaranty Company. From this judgment and from an order refusing a new trial this appeal is brought.

The testimony shows that on March 27, 1908, the judgment of the district court was affirmed in this court, and that pursuant to the provisions of Paragraph 1592, R. S. 1901, judgment was also entered against the Guaranty Company as surety upon the appeal bond. Thereafter, within the time allowed by law, a motion for a rehearing was made, which motion was denied by this court May 19, 1908. The action having been tried before the court without a jury, an appeal to the Supreme Court of the United States from the judgment

of this court was prayed, and was allowed by one of the
188 justices of the court on June 20, 1908. In the order allowing the appeal, it was directed that the judgment be stayed upon the appellants filing their supersedeas bond in the sum of $20,000, to be approved by any justice of this court. This order was filed with the clerk June 22, 1908. A bond in proper form was approved by one of the justices on July 14, and filed with the clerk on July 15, 1908. Citation was issued July 18, 1908, and served on July 31, 1908. It also appears that on or about June 18, the judgment creditor, Randolph, demanded of the Guaranty Company that it pay the judgment; that on June 24, 1908, the Guaranty Company paid the judgment in full, and thereafter, and, as a part of the transaction, took from Randolph a bond, with collateral security, for the return of the amount paid him, with interest, should the Supreme Court of the United States reverse the judgment of this court.

Appellants assign as error the overruling of their demurrer, insisting, first, that the complaint is bad for the reason that it does not show that the Sandovals had not paid the judgment at the time that the Guaranty Company paid it. The complaint alleges that "said defendants, on the 24th day of June, 1908, had wholly failed to pay the said judgment * * * and upon said date said sum was due and owing upon said judgment," and this, we think, is clearly sufficient.

It is also complained that the complaint fails to allege
189 that the amount sued for in this case was unpaid by the Sandovals to the Guaranty Company at the time of the commencement of this action. The allegation of the complaint in this respect is that "this plaintiff has demanded of the said defendants that they reimburse this plaintiff in the said several sums paid out as aforesaid, and that the defendants have refused to reimburse the plaintiff in said sum or any part thereof." While this allegation might not have been sufficient as against a special demurrer, we do not regard it as an entire failure to state an essential fact, but only a defective statement of the fact of non-payment, good when tested only by a general demurrer.

In considering the question whether the complaint as an entirety states a cause of action, it will be helpful to notice the statutes of the United States governing appeals from this court to the Supreme Court of the United States, and the decisions of the Supreme Court of the United States, and the decisions of the Supreme Court construing them. Section 1007 of the Revised Statutes provides:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the Clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with

the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas
190 execution shall not issue until the expiration of ten days."

By Section 1012, appeals from the circuit courts are made subject to the same rules, regulations and restrictions as are prescribed for writs of error, and by Section 1909, it is provided that writs of error and appeals from final decisions of the Supreme Court of Arizona shall be allowed to the Supreme Court of the United States in the same manner and under the same regulations as from circuit courts of the United States. Therefore, appellants had sixty days after the judgment was rendered, exclusive of Sundays, in which they could give security and suspend the judgment upon their appeal to the Supreme Court of the United States. This period of sixty days did not commence to run until May 19, the date the rehearing was denied.

Railroad Co. v. Bradleys, 7 Wall., 575.
Kingman v. Western Manufacturing Co., 170 U. S., 675.

Upon this date the liability of the surety became fixed.

Gillette v. Bullard, 20 Wall., 571.
Babbitt v. Finn, 101 U. S., 7.

"Execution cannot issue upon the judgment until the expiration of ten days, exclusive of Sundays, from the entry thereof. If the writ of error and bond are filed before the expiration of the ten days, no execution can issue so long as the case in error remains undisposed of. After the expiration of the ten days an execution may issue. Notwithstanding this, under the provisions of the act of 1872, upon the filing of the bond within sixty days from the time of the entry of the judgment a super-sedeas may be obtained. Such a supersedeas, however, stays proceedings only from the filing of the bond. It prevents further proceeding under an execution which has been issued, but does not interfere with what has already
191 been done." Bd. of Com'rs v. Gorman, 19 Wall., 661. See, also, Foster v. Kansas, 112 U. S., 201.

It is not necessary, in order to charge the sureties in an appeal bond, that an execution on the judgment recovered in the appellate court should be issued against the principal. Upon affirmance, the surety becomes liable to the same extent as the principal obligor.

Babbitt v. Finn, supra.

The supersedeas bond was not filed until July 15, 1908, and therefore the Guaranty Company was liable to execution upon the judgment at any time between May 31 and July 15. Being thus liable, had it a right to pay the judgment, or did it owe a duty to its principals to withhold payment during the period within which they might exercise the right to suspend the judgment, pending their appeal to a higher court? No case has been brought to our attention in which such a question has been presented. If we look to the general law governing suretyship, we find that a surety who is in law bound to pay an obligation, has an undoubted right to pay

the same and proceed against his principals or co-sureties for indemnity or repayment. He may do this as soon as his principal is in default, and without waiting for suit to be brought against him.

27 Amer. and Eng. Enc. of Law, 472.
May v. Ball, —— Ky. App., ——; 56 S. W., 7.
Nixon v. Beard, 111 Ind., 137; 12 N. E., 131.
192 Martin v. Ellerbe's Admr., 70 Ala., 326.
Feamster v. Withrow, 12 W. Va., 611.

We can see good reason why a surety on an appeal bond should not be held to be justified in paying within the ten days during which no execution can issue, but his principal not having suspended the judgment within that time, and he being liable to have his property taken upon execution, we perceive no reason why he may not pay the judgment and thus relieve himself of liability. A payment so made by a surety may work a hardship upon the principal, but we see no way of avoiding it except by the exercise of diligence in the matter of perfecting an appeal and filing a supersedeas bond. It is suggested by counsel for appellants that the Guaranty Company was not coerced to pay by fear of execution, since it does not appear that the mandate of this court had been sent to the district court. We do not see that this in any wise affects the situation. The filing of the mandate in the district court adds nothing to the liability of the surety. That is fixed by the judgment in this court. It is probably true that the judgment debtor must resort to the district court to obtain execution, but when a motion for rehearing is denied, the mandate should go to the district court at once, and if the clerk should delay in forwarding it, a mere suggestion, without notice, would cause it to be sent; therefore, the refusal of a surety to pay upon demand might almost immediately result in an execu-
193 tion against him being issued.

Upon payment being made by a surety, he is entitled to claim reimbursement by reason of any agreement of reimbursement which he may have with his principal, or may sue upon the implied promise which the law raises in his favor; or, if he is compelled to make payment in satisfaction of a judgment, he may be subrogated to the rights of the creditor under the provisions of Paragraph 3555, R. S. 1901. We think the court did not err in overruling the demurrer to the complaint.

The allegation in the complaint, and the testimony offered in support of it, that the Governor of the Territory had notified the Guaranty Company that the judgment was unpaid, that thirty days had elapsed since its rendition, and that unless the judgment was paid or excuse for its non-payment shown, the company would forfeit its rights to transact business as a surety company in the Territory, has given rise to what we regard as much unnecessary confusion, and assignments of error based upon rulings of the trial court admitting testimony to sustain the allegations have been discussed at length by counsel for appellants. Chapter 1, Title 8, Revised Statutes of 1901, providing for the regulation of surety companies doing business within the Territory, contains the following:

"Par. 418. That if any such company shall neglect or refuse to pay any final judgment or decree rendered against it upon
194 any such recognizance, stipulation, bond or undertaking made or guaranteed by it under the provisions of this act, from which no appeal, writ of error, or supersedeas has been taken, for thirty days from the rendition of such judgment or decree, it shall forfeit all right to do business under this act."

The act makes no provision for the revocation by the Governor of the license issued to a surety company upon its failure to pay within thirty days, and it is to be observed that at the time when payment was made (if the statute may be held applicable to judgments such as is involved in this case, where the taking of the appeal must depend upon the action of others, whose rights are governed by the laws of the United States), the forfeiture had already been incurred. The receipt of the telegram by the Guaranty Company may serve to explain the motives of the company in making the payment, but we do not see that it affects the legal relations existing between the parties to this action.

We come now to consider the assignment that upon all of the facts in evidence the court erred in rendering judgment for the Guaranty Company. This action is upon the express contract of appellants to reimburse the Guaranty Company any loss it may sustain by reason of having executed the appeal bond. The measure of recovery, at least so far as the amount paid to the judgment creditor is concerned, is the same as though brought upon the implied promise raised by the law. As we have seen, a surety, when he becomes legally liable so to do, may pay the obligation and proceed
195 against his principal to secure reimbursement. But he is entitled to nothing more than reimbursement.

"If the surety extinguishes the debt of the principal for any sum less than the full amount thereof, he can, in the absence of express contract, only recover from the principal the amount paid by him, and interest thereon, and costs. The implied contract is that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal. If he pays in depreciated bank notes, or other money which is below par, but is taken by the creditor at par, he can only recover from the principal the par value of such money. If he pays in land he can only recover the value of the land. He is entitled to recover the amount paid, not the amount extinguished by that payment. * * * If the surety, who compounds a debt for which his principal and himself have become jointly liable, takes an assignment of the debt to a trustee for himself, he can only claim against his principal the amount which he has paid. He occupied in that regard the same position as an agent, and cannot speculate out of his principal." Brandt on Suretyship and Guaranty Sec. 212.

The Supreme court of California, in Stone v. Hammell, 83 Calif., 547, 23 Pac., 703, in holding that a surety may not by satisfying the obligation by giving his own note, recover the amount of the note from his principal, before payment thereof, bases its holding upon the ground that the surety might recover the whole amount of the

principal and never pay his own note, "thus violating the cardinal rule that the surety shall not speculate out of the principal."

Lord Cottenham, in Reed v. Norris, 2 Mylne and Craig, 361, says:

196 "Now, if there had been no authority upon this subject, I should have found very little difficulty in making the precedent for deciding that, under these circumstances, the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or, at least, would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve on a surety? He enters into an obligation and becomes subject to a liability, upon a contract of indemnity. The contract between him and his principal is that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity."

Under the testimony in this case, what loss has the Guaranty Company sustained? The payment made by it to Randolph cannot be said to have been an absolute one, but one conditioned that the judgment be affirmed by the supreme court, since it has taken and holds security satisfactory to it for the return of the money with interest, in the event the judgment is reversed. It may not suffer the loss of the amount paid to Randolph. If the judgment in this action is sustained, it will collect the amount from the ap-

197 pellants, and if the Supreme Court of the United States reverses the judgment appealed from, it will also be repaid by Randolph. Such a result would manifestly be inequitable. To sanction it would certainly do violence to "the cardinal rule that the surety shall not speculate out of the principal." The Guaranty Company, in taking the security, as pointed out by the authorities to which we have called attention, may be said to have acted as the agent of the appellants. It took and still holds the security in its own name, and we do not think that it may claim reimbursement from its principals until its actual loss is ascertained, or at least that it may not recover without surrendering the security to its principals. We therefore conclude that the trial court erred in giving judgment for the amount paid to Randolph. However, we think that the Guaranty Company may recover in this action such amounts as it reasonably

expended in connection with the adjustment of the matter, for which it holds no security. These expenses aggregate $544.50, and upon this amount interest at the rate of six per cent per annum should be allowed from August 3, 1908, to the date of the judgment of the district court.

The judgment of the district court is therefore modified and reduced to the amount indicated, and, as so modified, is affirmed, with costs in this court to appellants; but without prejudice to the rights of the Guaranty Company to bring such further
198 action as may be necessary to establish its rights, should a right to reimbursement of the amount of the judgment accrue to it.

JOHN H. CAMPBELL,
Associate Justice.

We concur:
EDWARD KENT, *Chief Justice.*
RICHARD E. SLOAN, *Associate Justice.*
FREDERICK S. NAVE, *Associate Justice.*

(Endorsed:) No. 1093. In the Supreme Court of the Territory of Arizona. A. Sandoval, et al., vs. United States Fidelity & Guaranty Co. Opinion. Filed March 20, 1909. F. A. Tritle, Jr., Clerk.

And on to-wit: the twentieth day of March, 1909, being one of the regular juridical days of the January term of said Court, 1909, the following order and judgment inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

199 No. 1093.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby modified and reduced to the amount of five hundred forty-four and 50/100 ($544.50) Dollars, with interest thereon at the rate of six per cent (6%) per annum from August 3, 1908 to the date of the judgment of the District Court, and as so modified, is affirmed, but without prejudice to the rights of the Guaranty Company to bring such further action as may be necessary to establish its rights, should a right to reimbursement of the amount of the judgment accrue to it.

It is further ordered, adjudged and decreed that appellants herein do have and recover of and from the appellee herein their costs in this court, taxed at two hundred and four ($204.00) Dollars.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from A. Sandoval and P. Sandoval,

appellants herein, and E. J. Pellegrin and H. K. Chenoweth,
200 sureties on cost bond, its costs in the court below in this cause incurred.

And on to-wit: the first day of April, 1909, comes the appellee by its attorney and files in the clerk's office of said Court in said entitled cause its certain Motion for Rehearing in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1093.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
UNITED STATES FIDELITY AND GUARANTY CO., a Corporation, Appellee.

Motion for Re-hearing.

Now comes the United States Fidelity & Guaranty Company appellee, and moves for a rehearing of the appeal herein, and as grounds for such motion, specifies as follows, to-wit:

I.

Under the decisions of the courts, the receipt of collateral security by the surety to indemnify him upon his contract of suretyship is no defense in an action brought against the principal for moneys which the surety has been compelled to pay out by reason of his suretyship.

201 II.

The payment by the appellee to Randolph on the 24th day of June, 1908, of the amount of the judgment rendered against the appellee and the appellants herein, in the suit brought by Randolph was an absolute payment, and was in no sense a conditional payment, it appearing from the evidence that the bond from Randolph to Sandovals was given long after such payment, and after the cause of action set forth in the complaint had accrued and after demand made upon the appellants by the appellee for reimbursement of the amount paid Randolph; and that such bond was given by Randolph not in pursuance of any agreement or understanding had or made at the time of the payment to him.

III.

It was alleged in the complaint that the appellee paid the amount of the judgment to Randolph on June 24th, 1908, and such allegation was denied. The Court found as a fact that such allegation was true. There being evidence to sustain such finding this Court

should not infer from the evidence that the giving of the bond was a condition of the payment to Randolph.

IV.

The appellants did not assign as error that the finding of the *of the* Court that the appellee paid Randolph the amount of the judgment on the 24th day of June, 1908, was not sustained by the
202 evidence, and therefore such finding is not reviewable by this Court upon this appeal.

V.

The giving of the bond by Randolph could in no event effect the fact that the payment was an absolute one. When Randolph received the money, he received it with a legal obligation on his part in the event of a reversal of the judgment, to re-pay the money to the appellee, and the bond had no effect other than to commit Randolph in writing to do that which it was his legal and moral duty to do had no such bond been executed.

VI.

The fact that the surety company received collateral security from Randolph that he would fulfill such obligation, cannot effect the nature of the obligation, and, therefore, cannot alter the absolute character of the payment by appellee to Randolph.

VII.

The receipt of such collateral security by appellee can in no sense be considered a speculation by appellee in its suretyship. The security received was for the benefit of the appellants and hence for the benefit of the appellee. The appellee could not use or profit by such security. In the event of an affirmance, it was its duty to restore the same to Randolph. In the event of a reversal only could the appellee be benefited by it. Whenever the appellants should repay appellee the amount which ap-
203 pellee had paid to Randolph, the appellants by operation of law would be subrogated to the rights of the appellee in such collateral security. The appellee at all times held the same as trustee, such trust to become operative immediately upon the repayment of the amount of the judgment by the appellants to the appellee. Therefore, the diligence of the appellee in securing such collateral from Randolph inured to the benefit of appellants, and it was impossible for appellee to secure any benefit therefrom which benefit would not accrue by operation of law to the benefit of appellants.

VIII.

For the foregoing reasons there was no duty on the part of the appellee as suggested in the opinion of the Supreme Court to offer to surrender the security to the appellants. The interest of the appellants in such security was a contingent one, which they could

convert into an absolute interest at will by the re-payment to appellee of the amount which appellee had paid to Randolph. It cannot be presumed that appellee would have undertaken had the appellants repaid them this money by execution issued or otherwise, to convert this collateral in the event of a reversal of the Randolph judgment to their own use and thus defraud appellants.

The fact that the interest of appellants in such collateral
204 accrued automatically and by operation of law by subrogation, made a tender of the same by appellants unnecessary.

Wherefore appellee submits that the judgment should have been affirmed and that a rehearing should be granted.

EUGENE S. IVES,
Attorney for Appellee.

Service admitted.

(Endorsed:) Filed April 3, 1909. F. A. Tritle, Jr., Clerk.

And on to-wit: the thirtieth day of April, 1909, being one of the regular juridical days of the January term of said Court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1093.

A. SANDOVAL et al., Appellants,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellee.

At this day it is ordered by the Court that the Motion for Rehearing, filed herein by Appellee, be submitted.

205 And on to-wit: the first day of May, 1909, being one of the regular juridical days of the January Term of said Court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to wit::

No. 1093.

A. SANDOVAL et al., Appellants,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellee, and heretofore submitted, be, and the same is hereby, denied.

And on the same day to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said court,

1909, the following other order was had and entered of record in said cause in words and figures following, to-wit:

No. 1093.

A. SANDOVAL et al., Appellants,
vs.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Appellee.

At this day comes Mr. Eugene S. Ives for appellee herein,
206 in open court, and gives notice of appeal to the Supreme Court of the United States from the judgment of this court, and

Upon motion of Mr. Eugene S. Ives, it is ordered that the notice of appeal be entered, the appeal be and the same is hereby allowed and the amount of the cost bond fixed in the sum of One Thousand ($1,000.) Dollars.

And on to-wit: the twentieth day of May, 1909, comes the appellee by its attorney and files in the clerk's office of said Court in said entitled cause its certain Application and Notice for Appeal and Affidavit, in words and figures following, to-wit:

207 In the Supreme Court, Territory of Arizona.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
UNITED STATES FIDELITY & GUARANTY CO., a Corporation, Appellee.

Application and Notice for Appeal.

The above named appellee, the United States Fidelity & Guaranty Company, conceiving itself aggrieved by the final judgment entered on the 20th day of March, 1909, in the above entitled action and court, modifying a certain judgment rendered in the District Court of the Second Judicial — of the Territory of Arizona *and* and for the county of Santa Cruz, in favor of the above named appellee, and against the above named appellants, does hereby appeal to the Supreme Court of the United States from said judgment of this court so modifying the said judgment of the district court, and said appellee hereby prays that its said appeal be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, judgment and evidence in the case, duly authenticated, may be sent to the Supreme Court of the United States.

UNITED STATES FIDELITY & GUARANTY CO.,
By EUG. S. IVES, *Attorney.*

208 And now, to-wit, on the first day of May, 1909, the above application having been duly presented and considered, it is hereby ordered that the appeal above prayed for be allowed, and the same is hereby allowed on filing a good and sufficient bond for costs in the sum of one thousand dollars.

JOHN H. CAMPBELL,
Justice of the Supreme Court of the Territory of Arizona.

In the Supreme Court, Territory of Arizona.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
UNITED STATES FIDELITY & GUARANTY CO., a Corporation, Appellee.

Affidavit.

TERRITORY OF ARIZONA,
County of Pima, ss:

Eugene S. Ives, being duly sworn, deposes and says: that he is the attorney for the appellee the United States Fidelity & Guaranty Company, in the above entitled action; that this action was brought by the said appellee to recover from the appellants a sum of money upwards of twelve thousand dollars ($12,000.), claimed to be due the appellee by the appellants, and that the matter in dispute,
209 exclusive of costs, exceeds the sum of Five thousand dollars ($5,000.), being as aforesaid, upwards of Twelve thousand dollars ($12,000.).

EUGENE S. IVES.

Subscribed and sworn to before me this 1st day of May, 1909. My commission expires May 9, 1911.

JOSIE B. HENDERSON,
Notary Public.

(Endorsed:) No. 1093. Supreme Court, Arizona. A. Sandoval and P. Sandoval, Appellants, vs. United States Fidelity & Guaranty Co., a corporation, Appellee. Application and notice for appeal and affidavit. Filed May 29, 1909. F. A. Tritle, Jr., Clerk.

And on the same day to-wit: the twentieth day of May, 1909, comes the appellee by its attorney and files in the clerk's office of said court in said entitled cause its certain Assignments of Error in words and figures following, to-wit:

210 In the Supreme Court of the United States.

UNITED STATES FIDELITY & GUARANTY CO., Plaintiff-Appellant,
vs.
A. SANDOVAL and P. SANDOVAL, Defendants-Appellees.

Assignments of Error.

The plaintiff-appellant hereby assigns the following errors committed by the supreme court of the Territory of Arizona:

I.

The supreme court erred in modifying the judgment of the district court in favor of plaintiff-appellant, for the reason that the receipt of collateral security by the plaintiff-appellant from Randolph to indemnify it, is no defense to the action brought by it against the defendants-appellees under the contract of indemnity between appellant and appellees.

II.

The supreme court erred in modifying said judgment, for the reason that the payment by appellant to Randolph on the 24th day of June, 1908, of the amount of the judgment rendered against the appellant and the appellees in the suit brought by Randolph was an absolute payment, and was in no sense a condition of the payment, it appearing from the evidence that the bond given
211 from Randolph to the Sandovals, was given long after such payment and after the cause of action set forth in the complaint had accrued, and that such bond was given by Randolph not in pursuance of any agreement or understanding had or made at the time of the payment to him.

III.

The court erred in so modifying the said judgment, for the reason that the payment to Randolph was an absolute payment and the bond given by Randolph to the appellant was nothing more than a written obligation on the part of Randolph to perform what was already his legal duty, without respect to such bond, and the receiving of collateral security from Randolph, that he would fulfill such pre-existing obligation, did not alter or effect the nature of the obligation nor the absolute character of the payment by appellee to Randolph.

IV.

The supreme court erred in modifying said judgment for the reason that the obtaining of such collateral security from Randolph was an act for the benefit of both appellant and appellee, and did not relieve appellees from their duty to pay to appellants the amount which they had paid out to Randolph, and upon the re-payment by appellant of such amount the appellees would have been subrogated to the rights of appellant in such collateral security.

212 V.

The supreme court erred in modifying the said judgment for the reason that under the facts found, appellant is entitled as a matter of law to the judgment rendered by the district court.

All of which is respectfully submitted.

Dated Tucson, Arizona, May 1st, 1909.

EUGENE S. IVES,
Attorney for Appellant.

(Endorsed:) No. 1093. Supreme Court, United States. United States Fidelity & Guaranty Company, Pl'ff-Appellant, vs. A. Sandoval & P. Sandoval, Def't-Appellees. Assignments of Error. Filed May 20, 1909. F. A. Tritle, Jr., Clerk.

And on the same day, to-wit: the twentieth day of May, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Bond on Appeal in words and figures following, to-wit:—

213 *Bond.*

Know all men by these presents: That we, United States Fidelity & Guaranty Company, a corporation, as principal, and Hugo J. Donau and Albert Steinfeld, residents of the Territory of Arizona, as sureties, are held and firmly bound unto the appellees A. Sandoval and P. Sandoval in the full and joint sum of One thousand Dollars ($1,000) lawful money of the United States, to be paid to them, the said obligees herein, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this first day of May, 1909.

Whereas, the above named principal United States Fidelity & Guaranty Company, prosecuted an appeal to the Supreme Court of the United States, the same having been duly and properly allowed from a final judgment rendered against it and in favor of said obligees herein, in the Supreme Court of Arizona, to reverse the judgment rendered in said court.

Now, therefore, the condition of this obligation is such that, if the above named principal and obligees herein shall prosecute their said appeal to effect and answer for all damages and costs, if they fail to make said appeal good, then this obligation shall be
214 void, otherwise the same shall be and remain in full force and virtue.

U. S. FIDELITY & GUARANTY CO., [SEAL.]
Per EUGENE S. IVES, *Att'y in Fact.*
HUGO J. DONAU. [SEAL.]
ALBERT STEINFELD. [SEAL.]

TERRITORY OF ARIZONA,
County of Pima, ss:

Hugo J. Donau and Albert Steinfeld, being residents of the County of Pima, Territory of Arizona, being by me first duly sworn, on their

several oaths and each for himself, state, that they are the sureties in the above and foregoing bond; that after paying their just debts and liabilities they are each worth One thousand dollars ($1,000) in real and personal property within the jurisdiction of said court and subject to execution and levy, and that is not exempt from execution.

HUGO J. DONAU.
ALBERT STEINFELD.

Subscribed and sworn to before me this 1st day of May, 1909.
My commission expires May 9, 1911.
[SEAL.] JOSIE B. HENDERSON,
Notary Public.

(Endorsed:) No. 1093. Supreme Court, Arizona. A.
215 Sandoval & P. Sandoval, Appellants, vs. United States Fidelity & Guaranty Company, Def't-Appellees. Bond. Approved this 18th day of May, 1909. John H. Campbell, Associate Justice, Supreme Court of Arizona. Filed May 20, 1909. F. A. Tritle, Jr., Clerk.

And on to-w : the sixth day of July, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Statement of Facts in words and figures following, to-wit:—

216 In the Supreme Court, Territory of Arizona.

A. SANDOVAL and P. SANDOVAL, Appellants,
vs.
UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Appellee.

In the above entitled action the Supreme Court finds the facts to be as follows:

I.

That all the allegations of the complaint with respect to the residence and corporate character of the parties, and the compliance by the appellee with the statutes of this Territory, entitling it to transact business within the Territory of Arizona and within the county of Santa Cruz in said territory are true as therein stated.

II.

That on the 11th day of April, 1907, in an action then pending in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Santa Cruz in which that Court had jurisdiction of the parties and the subject matter, wherein one Epes Randolph was plaintiff, and the above-named appellants were defendants, a judgment was duly rendered and entered in
217 favor of said Epes Randolph against these appellants for the sum of $10,528.33 as set forth in said complaint, and that

thereafter the defendants in said action, the appellants herein, appealed from said judgment to the Supreme Court of this Territory.

III.

That in order to procure the appellee herein to become surety upon a supersedeas bond to be given upon such appeal, the appellants made a written application to the appellee a copy of which is set forth in the complaint in this action, and thereupon and pursuant to said application a bond was executed by the appellants as principals and the appellee herein as surety, conditioned as required by law, and thereupon the execution of said judgment was stayed in said appeal.

IV.

That thereafter and on the 27th day of March, 1908, the judgment of the Supreme Court of this Territory was duly rendered and entered upon said appeal in all things affirming the judgment of the Court therein appealed from and adjudging and decreeing that the said Epes Randolph do have and recover of and from the appellants herein and the appellee as surety upon such appeal bond the full amount of the judgment so appealed from with interest, together with the costs in said Supreme Court.

V.

218 That thereafter the said appellants filed a motion in said Supreme Court for a re-hearing of said cause and that said motion was thereafter and on the 19th day of May, 1908, denied, by said Supreme Court.

VI.

That thereafter and on the 19th day of June ,1908, the Governor of the Territory of Arizona, at the instance of said Epes Randolph caused a telegram to be sent to the appellee in the words and figures following, to-wit:

PHOENIX, ARIZONA, *June* 19, 1908.

The U. S. F. & G. Co., Balto., Md. Informal complaint has been lodged with me that Epes Randolph obtained judgment in Supreme Court of the Territory against you on appeal bond in case of Randolph versus Sandoval on twenty-seventh March last for ten thousand and some odd dollars and costs. That demand has been made on you for payment. That there has been no stay of judgment or steps to appeal from it. That you ignore his demands. Do you care to advise me of the reason.

JOSEPH H. KIBBEY,
Governor of Arizona. 3:30 p. m."

And thereafter and on the 24th day of June, 1908, the appellee did duly pay to the said Epes Randolph in satisfaction of said judgment and interest and costs, the sum of $11,484.95, being the full amount

thereof, and that upon said date the said sum was due and owing upon said judgment.

VII.

On the 24th day of June, 1908, and prior to the payment of said $11,484.95, one James H. Borland, representative of the appellee, being then in the city of San Francisco, had a telephonic talk with one Catesby Thom, also a representative of the said appellee, and one Eugene S. Ives, attorney for the said Randolph (both the
219 said Thom and the said Ives being then in the city of Los Angeles), with respect to the making of said payment; then after said telephonic conversation, and in pursuance of the directions of the said Borland, the said Thom in behalf of the said appellee, made the said payment as aforesaid; that thereafter, the said Borland claimed that it had been agreed between the said Randolph and the appellee that the said Randolph would refund the money to the appellee if under any proceeding that might be instituted in the case of Epes Randolph against A. and P. Sandoval, it should appear that it was not proper for the appellee to have paid the money; that the said Ives on the other hand claimed that the gist and substance of said telephonic conversation was that inasmuch as a supersedeas bond might have been filed with the Clerk of the Supreme Court in the city of Phœnix, Arizona, at the very time the said payment was being made, the said Ives in behalf of the said Randolph agreed that, the said payment being made at precisely three o'clock, in the event that it should transpire thereafter that such a supersedeas bond had been filed prior to said hour, then the said Randolph would return the said sum to appellee.

That thereafter, and on the 23rd day of July, 1908, the said Borland, Randolph and Ives met in the city of Los Angeles, and that at said meeting their respective contentions as aforesaid were
220 presented and discussed, and the said Randolph, by way of adjustment thereof, and in satisfaction of the agreement made over the telephone as aforesaid, whatever said agreement may have been and as a part of the transaction and arrangement under which payment was made by the appellee to the said Randolph, did give to the appellee a bond and collateral security in the words and figures following, to-wit:

"Know all men by these presents, That I, Epes Randolph of the City of Tucson, Pima County, Territory of Arizona, am held and firmly bound unto the United States Fidelity and Guaranty Company, a corporation organized under the laws of the state of Maryland in the penal sum of twenty thousand ($20,000.00) dollars for which amount, I bind myself, my heirs, executors, administrators and assigns firmly by these presents. The condition of the above obligation is such that

Whereas, The said Epes Randolph did on or about the 11th day of April, 1907, recover a certain judgment against A. Sandoval and P. Sandoval for the sum of ten thousand five hundred and twenty-eight dollars and thirty-three cents ($10,528.33) in the District

Court of the Second Judicial District of the Territory of Arizona, in and for the county of Santa Cruz, and

Whereas, the said A. and P. Sandoval did appeal from the said judgment to the Supreme Court of the Territory of Arizona, and upon such appeal did make and file their supersedeas bond, upon which said supersedeas bond the said United States Fidelity and Guaranty Company, obligee herein was surety for the said A. and P. Sandoval; and

Whereas, the said judgment of the District Court was duly and on or about the month of March, 1908, affirmed by the said Supreme Court of the Territory of Arizona, and the said Supreme Court did render judgment against the said A. and P. Sandoval and the said corporation, obligee herein, for the amount of said judgment rendered by the District Court, with interest and costs; and

Whereas, the said corporation, obligee herein, did on the
221 24th day of June, 1908, pay to the said obliger Epes Randolph the sum of eleven thousand four hundred and eighty-four dollars and ninety-five cents ($11,484.95) being the full amount due upon said judgment of the Supreme Court, with interest and costs to said date of payment; and

Whereas, the said A. and P. Sandoval on the 24th day of June, 1908, were proceeding to appeal from the said judgment of the Supreme Court of the Territory of Arizona to the Supreme Court of the United States, but on said date had not perfected their appeal, and

Whereas, the said A. and P. Sandoval have at the date of these presents duly appealed to the Supreme Court of the United States from the said judgment:

Now therefore, if the said Supreme Court of the United States should affirm the said judgment of the Supreme Court of the Territory of Arizona, or if in the event that the Supreme Court of the United States should reverse the said judgment of the Supreme Court of the Territory of Arizona, the said Randolph should refund to the said The United States Fidelity and Guaranty Company the said sum of eleven thousand four hundred and eighty-four dollars and ninety-five cents ($11,484.95) with interest from the 24th day of June, 1908, then this obligation to be void, otherwise to remain in full force and effect.

It is furthermore agreed that the said Epes Randolph in further consideration for the payment to him of the said sum of $11,484.95 as aforesaid, and as collateral security for this bond, will deposit, and doth herewith deposit with the said The United States Fidelity and Guaranty Company, obligee, twenty-five thousand shares of the capital stock of Huntington Beach Company, a corporation organized under the laws of the state of California, with the right to the said The United States Fidelity and Guaranty Company, in the event that the said Randolph should fail to pay to the said company the full sum of $11,484.95 with interest as aforesaid, within ninety days after the reversal of the said judgment of the Supreme Court of the Territory of Arizona by the Supreme Court of the United States, to sell the said stock or so much thereof as may be necessary at public or private sale, upon thirty days' notice to the said Randolph; and

to apply the proceeds thereof to the payment of the said sum of $11,484.95 with interest; the balance, if any, to be repaid to the said Randolph.

222 And it is further agreed that the said stock shall be returned by the said The United States Fidelity and Guaranty Company to the said Randolph upon the affirmance of the said judgment of the Supreme Court of the Territory of Arizona by the Supreme Court of the United States, or in event of the dismissal of the said appeal to the Supreme Court of the United States.

It is further agreed that the said Randolph shall have the right to withdraw the said stock deposited herewith as collateral by the substitution therefor either of other collateral satisfactory to James H. Borland, or whoever may be his successor, as manager of the United States Fidelity and Guaranty Company, or of a bond with individual sureties similarly satisfactory to the said Borland or his successor.

In witness whereof, the said Randolph has hereunto set his hand and seal at the city of Tucson, Pima County, Territory of Arizona, on this 31st day of July, 1908.

(Signed) EPES RANDOLPH.

(Certificate of acknowledgement.")

VIII.

On the said 24th day of June, 1908, no appeal, writ of error or supersedeas had been perfected from the judgment of said Supreme Court, and more than thirty days had elapsed since the denial of said motion for a re-hearing and said judgment of said Supreme Court was in full force and effect.

IX.

That by reason and in consequence of said appellee having entered into and executed said bond, and in and about the prosecution of this action in the District Court, the appellee sustained and incurred the following expenses, costs, charges and expenses, to-wit:

223

Expenses incurred prior to commencement of suit.	$676.75
Interest thereon from August 3, 1908, to date....	9.05
Expenses exclusive of counsel fees.....	300.00
That a reasonable attorney's fee for the attorney of the plaintiff for bringing this action and prosecuting the same to judgment is the sum of.....	2000.00

That included in the first item above set forth is the sum of $544.60 which appellee expended in connection with the payment and adjustment hereinbefore set forth, and for which it holds no security.

Dated July 3, 1909.

By the Court:

JOHN H. CAMPBELL,

Associate Justice Supreme Court of the Territory of Arizona.

(Endorsed:) No. 1093. Supreme Court, Arizona. A. Sandoval and P. Sandoval, Appellants, vs. United States Fidelity & Guaranty Company, Appellee. Statement of Facts. Filed July 6, 1909. F. A. Tritle, Jr., Clerk. By Angie B. Parker, Deputy.

224 UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and correct copy and Transcript of the Record, including the Judgment Roll, Reporter's Transcript of Testimony, Depositions, Exhibits, Opinion, Judgment, Motion for Rehearing, Application and Notice for Appeal, Affidavit of Value, Bond on Appeal, Statement of Facts, Assignments of Error and all Minute Entries had and entered of record in a certain cause lately pending in said Court, No. 1093, wherein A. Sandoval and P. Sandoval were appellants and The United States Fidelity and Guaranty Company was appellee, as the same remains on file and of record in my office, excepting only such parts thereof as have been omitted herefrom by direction of attorney for Appellant as not being necessary on the hearing of this appeal, and each such omission appears in this transcript with the reason for such omission stated.

And I further certify that the same, with the exceptions noted, constitute the record in said cause and the whole thereof.

And I further certify that the attached Citation is the
225 original Citation issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court this 17th day of August, A. D. 1909, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court.

226 In the Supreme Court of the United States.

UNITED STATES FIDELITY & GUARANTY CO., a Corporation,
Appellant,
vs.
A. SANDOVAL and P. SANDOVAL, Appellees.

Citation.

The United States of America to A. Sandoval and P. Sandoval, Greeting:

You and each of you are herby cited and admonished to be and appear at the session of the Supreme Court of the United States to be holden in the City of Washington, District of Columbia, on the first day of July, 1909, pursuant to an appeal duly allowed by the Honorable John H. Campbell, Justice of the Supreme Court of

the Territory of Arizona, on the first day of May, 1909, and duly filed with the clerk of the said court, from a judgment rendered in the said Supreme Court of the Territory of Arizona, on the 20th day of March, 1909, in an action on appeal to that court, wherein you and each of you were appellants, and the United States Fidelity & Guaranty Company was appellee, to show cause, if any there be, why the said judgment rendered by the said Supreme Court of the Territory of Arizona in your favor, should not be set aside, reversed, corrected and why speedy justice should not be done to the party in whose behalf the said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first day of May, 1909.

JOHN H. CAMPBELL,
Justice Supreme Court, Territory of Arizona.

227 [Endorsed:] No. 1093. Supreme Court United States. United States Fidelity & Guaranty Co., Appellant, vs. A. Sandoval and P. Sandoval, Appellees. Citation. Due service of the within citation is admitted this first day of June, 1909. G. P. Bullard, Att'y for Appellee. Filed June 1, 1909. F. A. Tritle, Jr., Clerk Supreme Court of Arizona.

228 In the Supreme Court United States.

UNITED STATES FIDELITY & GUARANTY CO., a Corporation, Appellant
vs.
A. SANDOVAL and P. SANDOVAL, Appellees.

Order Enlarging Time for Docketing Case and Filing Record in the Supreme Court of the United States.

The above-named appellant having appealed to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona and good cause having been shown why the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States should be enlarged, it is hereby

Ordered, That the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, be, and the same is, hereby enlarged until and including the thirtieth day of August, 1909, and the return day of the citation heretofore filed and served upon such appeal is hereby enlarged and extended until said last named day.

Dated June 16th, 1909.

JOHN H. CAMPBELL,
Associate Justice Supreme Court, Territory of Arizona.

229 TERRITORY OF ARIZONA,
County of Pima, ss:

S. L. Pattee, being duly sworn, deposes and says: that he was one of the attorneys for the above-named appellant in the Supreme Court of the Territory of Arizona; that said appellant has appealed to the Supreme Court of the United States from the judgment of this court in said action, and said appeal has been duly allowed by the Honorable John H. Campbell, Associate Justice of the Supreme Court of the Territory of Arizona, and citation issued therein, signed by said Justice, and, as affiant is informed and believes, said citation has been duly served; that the return day of the said citation is the first day of July, 1909; that a proposed statement of facts in the nature of a special verdict has been prepared by counsel for the above-named appellant, and a copy thereof submitted to the opposing counsel, but the same has not been agreed upon as correct nor objected to by counsel, nor has counsel in any way indicated whether such proposed statement is satisfactory or otherwise; nor has an unreasonable time elapsed within which they may do so; that affiant has reason to believe that such statement of facts cannot be determined and settled and signed on behalf of the said Supreme Court of the Territory in time to file the same and to enable the clerk of said court to prepare the record for filing with the Clerk of the Supreme Court of the United States and to transmit the same so as to reach the City of Washington by the return day of said citation, and that in order that such statement of facts may be allowed, settled and signed and the record prepared and transmitted to the Clerk of the Supreme Court of the United States, it will be necessary to enlarge the time therefor, pursuant
230 to Rule 9 of the Rules of the Supreme Court of the United States.

Wherefore, affiant prays that the time to docket said cause and file the record therein in the office of the Clerk of the Supreme Court of the United States and the return day of said citation be enlarged and extended for the further period of sixty days from the first day of July, 1909.

S. L. PATTEE.

Subscribed and sworn to before me this 16th day of June, 1909. My commission expires May 9, 1911.

[Seal Josie B. Henderson, Notary Public, Pima Co., Ariz.]

JOSIE B. HENDERSON,
Notary Public.

231 [Endorsed:] In the Supreme Court of the United States. United States Fidelity & Guaranty Co., a corporation, Appellant, vs. A. Sandoval and P. Sandoval, Appellees. Order enlarging time to File Record in U. S. Supreme Court. Filed June 19, 1909. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 21,815. Arizona Territory Supreme Court. Term No. 125. United States Fidelity & Guaranty Company, appellant, vs. A. Sandoval and P. Sandoval. Filed September 11th, 1909. File No. 21,815.

Supreme Court

OF THE

United States

United States Fidelity and Guaranty Company,
Appellant,
vs.
A. Sandoval and P. Sandoval,
Appellees.

No. 125

APPELLANT'S BRIEF.

STATEMENT.

The action, in which the judgment appealed from was entered, was brought by the United States Fidelity and Guaranty Company, appellant, upon a contract with defendants appellees, whereby it became surety upon a supersedeas bond given by them upon an appeal to the Supreme Court of Arizona from a judgment against them in favor of one Epes Randolph for the sum of $10,528.33.

The Supreme Court rendered judgment of af-

firmance, and in pursuance of the Arizona statute adjudged that Randolph recover from the defendants and this appellant as surety upon such appeal bond the amount of the judgment appealed from with interest and costs.

A motion for a rehearing was filed in said Supreme Court and denied on the 19th day of May, 1908. An appeal to the United States Supreme Court from such judgment was subsequently taken, and is now pending; on the 24th day of June, 1908, however, no such appeal, writ of error or supersedeas had been perfected.

It is alleged in the complaint that "said defendants (appellees) on the 24th day of June, 1908, had wholly failed to pay the said judgment or to appeal therefrom to the Supreme Court of the United States" [fol. 7]; this allegation is not denied in the answer.

On the 19th day of June, 1908, the governor of the territory of Arizona, at the instance of Randolph, caused the following telegram to be sent to the appellant:

"Phoenix, Arizona, June 19th, 1908.

The U. S. F. & G. Co., Baltimore, Md. Informal complaint has been lodged with me that Epes Randolph obtained judgment in Supreme Court of the territory against you on appeal bond in case of Randolph v. Sandoval on twenty-seventh March last for ten thousand and some odd dollars and costs. That demand has been made on you for payment. That there has been no stay of judgment or steps to appeal from it. That you

ignore his demands. Do you care to advise me of the reason?

JOSEPH H. KIBBEY,
Governor of Arizona. 3:30 p. m."

On said 24th day of June, 1908, the appellant paid to Randolph in satisfaction of said judgment and interest the sum of $11,484.95.

It is alleged in the complaint, and admitted in the answer, that prior to the giving of the supersedeas bond by appellant the appellees entered into a written application for such bond and agreement with the appellant, which is set forth in full at pages 2 and 3 of the transcript of record, and that the supersedeas bond was given in pursuance of such agreement.

In and by such application and agreement, the appellees contracted "to reimburse said company (appellant) for any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature which said company shall or may for any cause at any time sustain or incur, or have to pay to any person, or in consequence of said company having entered into or executed such bond."

It is alleged in the complaint that appellant's expenses in consequence of having executed said bond prior to the commencement of the action, amounted to $776.75.

The complaint then further alleges as follows:

"That this plaintiff has demanded of the said defendants that they reimburse this plaintiff in

the said several sums paid out as aforesaid, and that the defendants have refused to reimburse the plaintiff in said sum or any part thereof.

"That in order to collect the said sums from the said defendants, it has become necessary for this plaintiff to employ counsel to bring and institute this action, and this plaintiff has agreed to pay said counsel reasonable fee and charges for the institution and prosecution of this suit, and as plaintiff is informed and believes, the reasonable cost of the institution and prosecution of this suit will be the sum of $3,000, be the same more or less." [Fol. 8.]

The answer, after several admissions and denials, alleges that the facts were:

"That after the judgment was affirmed in the Supreme Court of the territory of Arizona, and a motion for rehearing of said cause was denied, a notice of appeal was duly given to the Supreme Court of the United States; that a stay bond for said appeal was duly made and entered into; that said cause was thereafter transferred to the Supreme Court of the United States, and is now pending in said court." [Fol. 12.]

It will be noted that there is no averment as to how long after the affirmance of the judgment such notice of appeal was given to the Supreme Court of the United States, and, therefore, upon the pleadings as they stand, the allegation in the complaint that the appellees had on the "24th day of June, 1908, wholly failed to pay the said judgment or to appeal therefrom to the Supreme Court of the United States" remains uncontradicted.

It appears from the statement of facts found by the Supreme Court of Arizona, that

"On the 24th day of June, 1908, and prior to the payment of said $11,484.95, one James H. Borland, representative of the appellee (appellant here), being then in the city of San Francisco, had a telephonic talk with one Catesby Thom, also a representative of the said appellee (appellant here), and one Eugene S. Ives, attorney for the said Randolph (both the said Thom and the said Ives being then in the city of Los Angeles), with respect to the making of said payment; then after said telephonic conversation, and in pursuance of the directions of the said Borland, the said Thom, in behalf of the said appellee (appellant here), made the said payment as aforesaid; that thereafter, the said Borland claimed that it had been agreed between the said Randolph and the appellee (appellant here) that the said Randolph would refund the money to the appellee (appellant here) if under any proceeding that might be instituted in the case of Epes Randolph against A. and P. Sandoval it should appear that it was not proper for the appellee (appellant here) to have paid the money; that the said Ives on the other hand claimed that the gist and substance of said telephonic conversation was that inasmuch as a supersedeas bond might have been filed with the clerk of the Supreme Court in the city of Phoenix, Arizona, at the very time the said payment was being made, the said Ives, in behalf of the said Randolph, agreed that, the said payment being

made at precisely three o'clock, in the event that it should transpire thereafter that such a supersedeas bond had been filed prior to said hour, then the said Randolph would return the said sum to appellee (appellant here).

That thereafter, on the 23rd day of July, 1908, the said Borland, Randolph and Ives met in the city of Los Angeles, and that at said meeting their respective contentions as aforesaid were presented and discussed, and the said Randolph, by way of adjustment thereof, and in satisfaction of the agreement made over the telephone as aforesaid, whatever said agreement may have been and as a part of the transaction and arrangement under which payment was made by the appellee (appellant here) to the said Randolph, did give to the appellee (appellant here) a bond and collateral security in the words and figures following, to-wit:

By the terms of the bond Randolph obligated himself to refund to the appellant the money paid him in the event that the United States Supreme Court should reverse the judgment in his favor against the Sandovals, and gave the appellant as collateral security for such obligation 25,000 shares of the capital stock of the Huntington Beach Company.

Neither the giving of this bond nor its attending circumstances were pleaded.

The cause was tried by the court without a jury

and resulted in a judgment in favor of the plaintiff for $14,683.25. The items appear in the findings of the district court, at page 9 of the transcript.

From this judgment the defendants, appellees here, appealed to the Supreme Court of Arizona, and presented several assignments of error. These are discussed seriatim in the opinion of the Supreme Court, and were all resolved in favor of the plaintiff appellant save one. That court held that the giving of the bond by Randolph to appellant made the payment by appellant a conditional one, and that for that reason the trial court erred in giving judgment for the amount paid to Randolph. It held, however, that the plaintiff was entitled to recover "such amounts as it reasonably expended in connection with the adjustment of the matter," which aggregated $544.50. It accordingly modified the judgment by reducing it to such amount, and affirmed it as so modified, but without prejudice to the rights of the plaintiff "to bring such further action as may be necessary to establish its rights, should a right to reimbursement of the amount of the judgment accrue to it."

Appellant filed a motion for a rehearing, which was denied, and thereupon appealed to this court. The motion for a rehearing appears at pages 97 and 98 of the transcript.

Assignment of Errors.

The appellant assigns the following errors committed by the Supreme Court of Arizona.

I.

The Supreme Court erred in modifying the judgment of the district court in favor of plaintiff-appellant, for the reason that the receipt of collateral security by the plaintiff-appellant from Randolph to indemnify it is no defense to the action brought by it against the defendants-appellees under the contract of indemnity between appellant and appellees.

II.

The Supreme Court erred in modifying said judgment, for the reason that the payment by appellant to Randolph on the 24th day of June, 1908, of the amount of the judgment rendered against the appellant and the appellees in the suit brought by Randolph was an absolute payment, and was in no sense a condition of the payment, it appearing from the evidence that the bond given from Randolph to the Sandovals (*sic*, should be appellant) was given long after such payment and after the cause of action set forth in the complaint had accrued, and that such bond was given by Randolph not in pursuance of any agreement or understanding had or made at the time of the payment to him.

III.

The court erred in so modifying the said judgment, for the reason that the payment to Randolph was an absolute payment and the bond given by Randolph to the appellant was nothing more than a written obligation on the part of Randolph to perform what was already his legal duty, without respect to such bond, and the receiving of collateral security, from Randolph, that he would fulfill such pre-existing obligation, did not alter or effect the nature of the obligation nor the absolute character of the payment by appellee to Randolph.

IV.

The Supreme Court erred in modifying said judgment for the reason that the obtaining of such collateral security from Randolph was an act for the benefit of both appellant and appellee, and did not relieve appellees from their duty to pay to appellant the amount which they had paid out to Randolph, and upon the repayment by appellant of such amount the appellees would have been subrogated to the rights of appellant in such collateral security.

V.

The Supreme Court erred in modifying the said judgment for the reason that under the facts found appellant is entitled as a matter of law to the judgment rendered by the district court.

ARGUMENT.

I.

The taking of Randolph's bond and collateral did not deprive appellant of its right to recover from appellees the amount paid Randolph.

The Supreme Court holds that the payment to Randolph was not premature [fols. 191-2]. It was therefore not only the right but the duty of appellant to make such payment. It follows necessarily that upon such payment a cause of action accrued in its favor against the appellees for the amount so paid. The payment having been made on June 24th and the bond not having been given by Randolph until the 23d of July, it would seem to follow that such cause of action existed continuously from June 24th to July 23rd. If this be admitted, then in order to sustain the reversal it must be assumed that upon that date such cause of action terminated, but appellees cannot make such admission; for to do so raises at the very threshold of their argument the fatal objection that the facts claimed to have the effect of terminating this existing cause of action are new matter constituting a defense and could not be availed of unless pleaded.

Piercy v. Sabin, 10 Cal. 22.

Therefore the appellees and the Supreme Court in its opinion contend that no cause of action at any time accrues in appellant's favor, and under-

take to meet the objection that the bond was not given until nearly a month after the payment by arguing that nevertheless the giving of the bond and the payment were parts of the same transaction.

It is true that the Supreme Court finds as a fact that Randolph gave the bond "as a part of the transaction and arrangement under which payment was made." We are familiar with the established rule that this court will not inquire into the correctness of the facts found by the Supreme Court. But such rule will not restrain this court from interpreting such facts in the light of other facts found and of the evidence, if there be no conflict.

The only evidence upon the matter of the bond given by Randolph consists of the testimony of Borland and Ives.

Omitting the portions of his answer stricken out by the court, Borland testified as follows:

"Upon receipt of telegrams from the home office of my company, my associate, Mr. H. D. V. Johns, I took up the matter with the company's representative at Los Angeles California, and Nogales, Arizona. Upon receipt of a further telegram from the home office, and also receiving information from Mr. Frank M. Kelsey at Los Angeles, California, I instructed Mr. Kelsey by telephone on June 24th, 1908, to inform Mr. Epes Randolph that if A. and P. Sandoval did not settle the judgment by three o'clock of that afternoon, I would authorize him to draw upon this office for the full amount of the judgment. At 3:30 Mr.

Catesby Thom telephoned me from Los Angeles, California, advising that the judgment had not been settled. I therefore authorized him to pay the amount to Mr. Epes Randolph and draw on the United States Fidelity and Guaranty Company for the full amount. In accordance with my instructions, draft was drawn and paid." [Fol. 128.]

"Upon further instructions from the home office, and owing to the amount involved, I followed up my instructions as previously stated, and proceeded to Los Angeles, California, on July 21st, 1908. On the following day, July 22, I met Mr. Epes Randolph and Mr. Frank M. Kelsey, at which time I discussed with Mr. Randolph the form of agreement that he should give our company, setting forth the understanding that if under any proceedings that might be instituted in the case of Epes Randolph v. A. and P. Sandoval, it should appear that we had paid the judgment prematurely, that Mr. Randolph would refund the money to our company. At this meeting he asked that I allow the matter to go over until the following day, when he would have his attorney, Mr. Eugene S. Ives, present. On the afternoon of July 23rd, 1908, I met Mr. Randolph and Mr. Ives, and Mr. Kelsey was also present, and at this meeting Mr. Randolph agreed to give our company a bond guaranteeing the return of the money to us in case the judgment should not be affirmed." [Fol. 129.]

Ives testified:

"A. The conversation that occurred was this, Mr. Morrison: Mr. Thom talked with Mr. Borland; I insisted in my talk with Mr. Thom and Mr. Kelsey that this money should be paid, and told him that I would insist that the governor revoke the license if the money was not paid, and

Mr. Thom then at about one o'clock stated to me, he was talking over the 'phone at the time to Mr. Borland, that Mr. Borland wanted to pay it, but that for all they knew the supersedeas bond might be (deemed) filed by Sandoval and Company in Phoenix at that very minute, and thereupon I stated that that expense *(sic)* might be met at any time, and thereupon Mr. Thom again talked to Mr. Borland, repeated what I had said, and Mr. Thom then again said that Mr. Borland said that if the word did not come that the bond had been filed before three o'clock, precisely at three o'clock they would pay me the amount of the judgment, provided I would secure them if it should thereafter transpire that prior to three o'clock, and I assured them that should it afterwards transpire that the supersedeas bond had been filed prior to that date, that I would return the money, and also that I would return it if it was not proper that they should have paid it. Now, exactly as to what transpired between Thom and Borland on that point I don't know. The money was paid, and it transpired that the bond had not been filed at that time. Now, if you want me to state what occurred afterwards between Mr. Borland and myself, I will.

Q. Yes.

A. After that I went to Los Angeles, it was about the 15th of July, maybe the 25th, I can find the precise date in a little while, but in any event Mr. Borland, Mr. Randolph and Mr. Kelsey were present, and Mr. Borland stated that we had agreed, as he understood it, with Mr. Thom, that if it was not proper for them to have made the payment I would return it, and wanted to know what we would do under the circumstances, and I resisted that and said that the only agreement was that if the bond should turn out to have been filed before three o'clock, that we would return it, and then there was an issue about it, and I said to

Mr. Borland that in case the judgment should be reversed by the Supreme Court of the United States (it was stated in the conversation that the Sandovals had appealed to the Supreme Court of the United States) that Randolph would have no objection whatever to giving them a bond to that effect." [Fols. 98-9.]

At the conference on the 23d of July, 1908, at which Borland was present and Randolph agreed to give the bond in evidence, Randolph need not have given any. Borland did not claim that Randolph was obligated to give the bond which was given. Randolph did not deem that he was obligated to give any bond at all. The transaction at the time of the payment had been conducted over the telephone between Borland in San Francisco and his representative Thom in Los Angeles.

As a result of it, Mr. Thom paid the money. Mr. Thom made no statement to Ives that the surety company would expect Randolph to refund the money, except in the event that it should appear that a supersedeas bond had been filed before the actual time of payment. Borland, however, unquestionably in good faith, contended that his understanding of his communication (not to Ives but to Thom) was that if it should appear that the Surety Company had paid the judgment prematurely, Randolph should refund the money. In order to adjust this difference, and not in pursuance of any obligation, Randolph agreed to do

what? ONLY THAT WHICH IT WAS HIS LEGAL DUTY TO DO ANYHOW.

"Where money has been paid upon an erroneous judgment which after the payment has been reversed the party paying may maintain an action to recover it back. It is not necessary to the right of action that payment should have been coerced by execution."

Schaley v. Halsey, 72 N. Y. 578;

Bank of U. S. v. Bank of Washington, 6 Peters 8;

Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963.

We believe that this is the unquestioned rule.

The written obligation given by Randolph, therefore, expressed nothing more than the obligation implied in law in any event. Converting it from an implied to an express contract did not change its character. The rights of the parties to the payment remained precisely as if they had been content to rest upon the implied agreement. Randolph agreed in writing to do exactly what the law would have compelled him to do with the writing. The written obligation did not add even a "jot or tittle" to the obligation he would have been under without any writing.

To repeat, then, Randolph declined to acknowledge Borland's contention that he was under any obligation to return thre money in case it should transpire that the surety company had paid the same prematurely; but as found in the statement

of facts Randolph after "their respective contentions were presented and discussed * * * by way of adjustment and in satisfaction of the agreement made over the telephone, whatever that agreement may have been," avowed his willingness to put in writing what was already his then existing legal obligation; and to give collateral security for its performance.

While, therefore, the bond was in a sense a part of the transaction between Randolph and the Surety Company, nevertheless, and notwithstanding the language employed in the bond itself, it was not a part of such transaction in the sense of being a condition of the payment. The payment was made unattended by any condition other than the understanding between Borland and Ives at the telephonic talk on the day of the payment; and such condition did not depend upon any future happening, but upon the ascertainment of a then existing situation.

Borland and Ives each had his own version of said understanding. Neither understood that Randolph was to give any bond or any collateral; therefore, whatever may have been their understanding as to the condition of the payment, the bond and collateral was not such condition.

Ives understood that Randolph was not to refund the money unless it should transpire that a supersedeas bond had been filed at Phoenix prior to the time of the payment made in Los Angeles.

Borland understood that Randolph was to refund the money, if it should appear that the payment had been prematurely made.

Whether it had been prematurely made involved a question of law. Ives recognized that Randolph was obligated to refund, without respect to the telephonic understanding, in the event that the United States Supreme Court should reverse the judgment; so Borland and Ives made a new agreement whereby they substituted for the telephonic understanding the giving of the bond and collateral.

There was no compromise between the Surety Company and Randolph (as suggested in appellees' brief on the motion for a rehearing) of Randolph's judgment against the Surety Company—there was, if the use of the word "compromise" be deemed desirable, a compromise between the Surety Company and Randolph of their difference as to what was the telephonic understanding, and such compromise consisted not in their concluding that the bond and collateral was such understanding, but in their substituting such bond and collateral for the understanding, whatever the same might have been.

It is, therefore, submitted:

First: That there was but one condition of the payment and that such condition was either the "prematureness" of the payment or the fact of a supersedeas bond having been filed prior to it.

The payment not having been premature and the supersedeas not having been filed, the payment was in fact absolute and the cause of action sued upon accrued immediately.

Second: If the subsequent giving of the bond by Randolph had any legal effect whatever upon such cause of action, it should have been pleaded as a special defense.

If it had been so pleaded or the point been raised upon the trial, which the record shows it was not, the Surety Company could have offered to assign the bond and collateral to the appellees, even though, as we shall hereafter contend, such offer was entirely unnecessary.

II.

Even if Randolph had given the bond as security at the time of the payment and as a condition precedent to such payment, and the matter were properly presented by the pleadings, the receipt of such bond and security by appellant would not be a defense to this action.

The principle affirmed in the opinion of this court that a surety is entitled to "nothing more than a reimbursement," and that he shall not "speculate out of the principal," is unquestionably sound law.

The appellant, however, cannot speculate out of the principal in this case. The rule quoted applies to a case where the surety makes his payment either in property other than money, which

is worth less than the amount of the debt, or as in the case of Stone v. Hammel, 83 Cal. 547, 23 Pac. 703, by giving his own note, which is no payment at all.

In this case the surety company paid the amount in money.

It is true that if the judgment should be reversed by the Supreme Court of the United States, Randolph must pay the money back. But suppose the judgment should be affirmed by the Supreme Court of the United States, is it just that the Surety Company, which was not interested in Sandoval's obligation to Randolph, should be compelled to wait for a year or more before it can enforce reimbursement?

Security is not money. Collateral security is not money. An agreement to indemnify is not money. For money paid out by the surety, the surety has an instant cause of action, and this without respect to the fact that it holds indemnity which may protect it against eventual loss. This principle has been settled by the courts.

> "Equality is equity. The moment one co-surety or joint judgment debtor pays the debt of his principal, he has a right to recover from his co-surety or joint judgment debtor his proportionate share. The law gives him this right, and also imposes upon his co-surety the duty of paying his proportionate share. The obligation is as binding upon the co-surety as if created by promissory note or contract. *It would be no defense for a de-*

fendant, when sued upon a promissory note or other written contract, to set up that the plaintiff held collateral securities or property for the purpose of indemnifying himself. Why should it be a defense in this kind of an action. Why should the plaintiff in an action for contribution, after having paid out his money, be compelled to wait until he can realize upon some collateral indemnity, which may require years, while his co-surety, who was as much bound in law and morals as himself, by the bond, has paid nothing? This would not make the burdens of his co-sureties equal. The indemnity is for the benefit of one co-surety as much as for the other, no matter which holds it. Civ. Code Sec. 2849. Either one could apply to the court for its sale, or to enjoin a wrongful disposition of it. The burden of finding a market for it, and applying its value towards the debt of the principal, should be borne by one as well as the other. There is no reason why the co-surety who has paid the debt of his principal should assume the burden of disposing of the indemnity, and the additional burden of waiting until it is disposed of, before he can receive from his co-surety his proportion."

Williams v. Richl, 127 Cal. 365, 59 Pac. at page 764.

To the same effect see:

Paulin v. Kaighn, 29 N. J. 483;

Batchelder v. Fisk, 17 Mass. 464.

III.

The surety company was under no obligation, as suggested in the opinion of this court, to surrender to appellees the securities given to it by Randolph.

Where there are two or more persons sustaining the relation of so-surety, and one of them has received security from the principal for his own indemnity, and the other surety pays the debt, he thereby becomes entitled to all the securities held by the first surety.

Butler v. Birkey, 13th Ohio St. 514.

> "The company did hold a large amount of that stock. Whether it held it as an indemnity for the liabilities it had assumed, we do not care to inquire. Assuming that it did, the fact is quite immaterial. It surely cannot be maintained that a surety who held several securities for his indemnity, cannot use one of them because he has another to which he might resort."
>
> Muller v. Dows, 94 U. S. at p. 452.

The taking of collateral security in no way changed the agreement between the parties. The contract or obligation remained the same. Its payment was better secured in the event that it should become necessary to enforce its performance, but that was all. The security added nothing to the agreement. It simply put in the hands of the surety company property out of which it could enforce payment of the obligation, in the

event of the happening of the contingency upon which the obligation would become effective, but it did not affect the obligation itself. The security was a mere deposit, unavailable to the surety company until reversal of the judgment, and then only a mere security, to which it might resort or not as it chose.

When a surety pays the debt for which he becomes surety, he has an immediate right of action against the principal for reimbursement. His cause of action then accrues, and from that time on the statute of limitation commences to run. Though he may have taken security to indemnify him against loss, he may nevertheless maintain an action for reimbursement, unless it has been agreed that he shall look only to the security for his indemnity.

Cornwall v. Gould, 4 Pickering 444.

His rights, in such case, are those of the ordinary creditor who has taken collateral security for his debt; he may reimburse himself from the security, or he may ignore it and sue on the debt. But the giving of collateral security, in itself, never changes his rights, and he may pursue the same remedies as if no security had been given, in the absence of an express agreement to the contrary.

Polhemus v. Prudential Realty Corporation, 74 N. J. L. 570, 67 Atl. 303.

The moment, therefore, that appellant paid Randolph, a cause of action arose in its favor against its principals for the amount paid. The fact that collateral security had been taken from Randolph in no manner impaired this right. It might ignore the security and pursue its recognized remedy against its principals.

The fallacy of the view taken by the Supreme Court of Arizona lies in the assumption that appellant has lost nothing. It has actually lost the amount paid to Randolph. The fact that it may at some future time be paid back this amount does not alter the fact of the present loss. For that loss it is entitled to present reimbursement.

But it is said by the Supreme Court of the territory that "if the judgment in this action is sustained, it will collect the amount from the appellants, and if the Supreme Court of the United States reverses the judgment, the judgment appealed from, it will also be repaid by Randolph." But this ignores the undoubted effect of the collection of the judgment in this case. As in every case, where security has been given for the payment of a debt, and the creditor ignores the security, as he has the right, and collect the debt by ordinary action, the security is released and must be returned to the detbor. It might as well be said that one holding collateral security may not pursue his ordinary action because he may recover a judgment which must be paid and also be paid out of the collateral.

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Payment of the judgment rendered by the court of first instance in this case would at once subrogate the Sandovals to every security held by the surety company for repayment of the amount of the former judgment in case of reversal.

Nelson v. Webster, 72 Neb. 332, 68 L. R. A. 513, and exhaustive note in 68 L. R. A.

And upon payment of the amount which the surety company paid to Randolph the Sandovals would probably be entitled, upon proper showing, to an assignment of the obligation and security which the surety company took from Randolph.

Forms of action are abolished in Arizona, and equitable defenses may be pleaded in legal actions, and the proper course, if the Sandovals desired subrogation, would be to plead the matters entitling them to it, as suggested in

Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865.

There was nothing in the pleadings in this case upon which to base a claim for subrogation, but, ignoring any question of pleading, the utmost effect the taking of security by the surety company would have would be to warrant the granting of relief by way of subrogation, of the kind permitted in Knoblauch v. Foglesong.

The suggestion in the opinion of the Supreme Court of the territory that the surety company

should have surrendered its security in order to maintain this action, is wholly untenable. A surety is not required to surrender his security until he is relieved of liability or reimbursed for liability incurred and paid.

Smith v. Wigler, 72 N. J. Eq. 559, 65 Atl. 900;

27 Am. & Eng. Enc. of Law, 473.

A tender is only necessary where a right is made dependent upon the payment of money or delivery of property.

28 Am. and Eng. Ency. Law (2d Ed.), page 4.

The right of appellees to the securities pledged by Randolph could not accrue until they had actually reimbursed appellant the amount which it had paid to Randolph. Therefore, no tender on the part of appellant was a condition precedent to the right to enforce such payment. Nor was there any necessity for appellant to offer to turn over the securities upon payment by appellees, for the reason that the absolute right of appellees to the benefit of such securities followed as a matter of law automatically from the very fact of payment.

Upon payment appellant immediately became, to the extent of such securities, trustee for appellees.

If it had been alleged as a defense that appel-

lees had offered payment, accompanying the same by a demand for the securities so pledged, and that appellant had refused such offer, such demand and refusal might have been a defense; but it will not be presumed by any court that a trustee lawfully in possession of securities will either misappropriate them or repudiate his trust obligation.

It appears, therefore, that after the appellant surety company had fulfilled its duty and paid Randolph, it had its undoubted right of action against the appellees for reimbursement.

To this the appellees had no defense.

Had the judgment by the Supreme Court of the United States been reversed prior to the giving of any bond by Randolph the appellees if they had reimbursed the surety company would have had, by subrogation, the right to sue Randolph and recover the amount paid to him. Had Randolph been unable to respond to such judgment the appellees would have lost the full amount so paid. This was the condition, and continued to be so, until the 23d day of July, 1908. On that day the surety company, by diligence, obtained from Randolph security that in the event of a reversal he would respond to his already existing legal obligation to repay the money. The situation of appellees became by operation of law improved by this diligence of appellant. They became immediately vested with a right, contingent upon their reimbursing appellant, to be subrogated to its

rights to collect out of the collateral so pledged by Randolph. How, therefore, can it be argued that the surety company by thus acquiring security ultimately for the benefit of the appellees themselves, speculated to their disadvantage, and thereby retarded its own right to reimbursement? It seems to us that this position is both illogical and inequitable. Certainly it is not supported by authority.

IV.

The Demurrer was Properly Overruled.

The appellees filed a general demurrer, and assigned that the court erred in overruling the same, for the reasons:

First: That the facts set forth in the complaint show that the payment of the judgment by appellant was voluntary and negligent.

Second: That there is no allegation in the complaint that the defendants had not paid the judgment in the case of Randolph against Sandoval to the said Randolph at the time that appellant paid the same.

Third: That the complaint fails to allege that the amount sued for was unpaid at the time of the commencement of this action.

We care to make no comment upon the first reason assigned.

The allegation heretofore quoted, which is admitted in the answer, "that said defendants on the

24th day of June, 1908, had wholly failed to pay the said judgment," disposes of the second reason.

The contention that non-payment by the appellees and breach of contract is not properly alleged, is without merit and was not sustained by the authorities cited in appellees' brief in the lower court. They relied upon the case of Scroufe against Clay (71 Cal. 123). This was an action on a promissory note. The complaint averred that the defendant has refused and still refuses to pay "the note or any part thereof."

A special demurrer was interposed to the complaint. Such demurrer was based upon the ground that there was no allegation of non-payment. The court reversed the judgment, overruling the demurrer, stating that "the averments of the complaint are not equivalent to averment of non-payment. The failure to pay constitutes the breach, and must be alleged."

This case was reviewed by the Supreme Court of California in the case of Gardner against Donnelly (86 Cal. 367). At page 373 the court says:

> "It is also claimed that the alleged demand was insufficient, because it was 'for the payment of said judgment, with interest thereon, and costs,' and a portion of the judgment had already been paid. There might be something in this point if the defendants had offered or shown a willingness to pay the amount still due, but, as alleged, they and each of them neglected and refused 'to pay the balance due on said judgment, or any

> portion thereof.' We think the allegation of demand and refusal sufficient, certainly in the absence of a special demurrer.
>
> "Finally, it is urged that the judgment should be reversed, because there was no sufficient averment in the complaint of non-payment; and in support of this position counsel cite Scroufe v. Clay, 71 Cal. 123. In answer to this, it is enough to say that the same point was considered and overruled in O'Hanlon v. Denvir, 81 Cal. 60, 15 Am. St. Rep. 19; Rankin v. Sisters of Mercy, 82 Cal. 88, and Grant v. Sheerin, 84 Cal. 197."

The Arizona statute in effect at the time this action was commenced, provided for special demurrer (L. 1907, Ch. 74, Sec. 1, Subd. 3), and these decisions of the Supreme Court of California are conclusive.

In the case of Rankin v. Sisters of Mercy, 82 Cal. 88, cited in the foregoing opinion, the court says, at page 90:

> "In support of the appeal it is claimed that the complaint did not state facts sufficient to constitute a cause of action, because there was no averment of non-payment. The averment was, that 'defendant has neglected and refused to pay,' etc. This we think is sufficient. To neglect to do a thing means to omit to do it, not to do it, and the averment was, therefore, equivalent to a statement that defendant had failed and refused to pay."

In the case of Grant v. Sheerin, 84 Cal. 197, the court, also reviewing and interpreting Scroufe v. Clay, relied on by appellees, at page 200, says:

"But there is a plain distinction between an entire failure to state essential facts and a statement of such facts imperfectly or defectively. In the one case the defect can be reached by a general demurrer, while in the other it can only be reached by a special demurrer. The rule upon this subject is thus stated in Harnish v. Bramer, 71 Cal. 158: 'If a complaint fails to state any fact or facts essential to a recovery, the defect may be reached by a general demurrer. If, however, it states all the essential facts, but states them improperly or defectively, the defect can only be reached by a special demurrer, particularly designating the specific point at which it is aimed.' In Scroufe v. Clay, *supra*, there was not an entire failure to state in the complaint the fact of non-payment, but the averment was simply uncertain and defective. And the same is true of this case. But in the former case the demurrer was special, while here it was general. In our opinion in this case the complaint stated a cause of action, and was sufficient when tested only by a general demurrer."

These cases are squarely in point, and it seems to us dispose of the contention of appellees under consideration, as frivolous. The provision in the application and agreement is that the appellees agreed to reimburse appellant. The allegation is that appellant demanded such reimbursement, and the appellees refused. This was a distinct breach of contract. As stated by the Arizona Supreme Court on this question:

> "The breach, therefore, on his part consists in his failure *or refusal* to pay for the work done or agreed to be done."
>
> McPherson v. Hattich, 85 Pac. 732.

Even had there not been an express allegation of a refusal to reimburse, the subsequent allegations heretofore quoted, "that in order to collect the said sums from the said defendants it became necessary for this appellant to employ counsel to bring and institute this action," which allegations are not denied in the answer, are sufficient to constitute an allegation of non-payment good against a general demurrer. Taken as a whole, the complaint clearly states all the essential facts.

V.

The Depositions were Properly Admitted.

The depositions referred to were properly admitted for the reasons given by the court. Even if improperly admitted the error would not have been prejudicial. For, as will be subsequently argued, it was the right and the duty of appellant to have paid the judgment even if the governor of Arizona had taken no steps to compel the appellant to comply with the Arizona law.

VI.

The district court did not err in rendering judgment in favor of the appellant and against the appellees.

The application made by the appellees for the bond, set forth in the complaint, and admitted by the answer, constitutes an express contract of indemnity, and the rule is that if there is such an express contract, a suit for reimbursement may be brought thereon.

22 Am. & Eng. Ency. Law, 484, and cases cited in Note 11;
Powell v. Smith, 8 Johns, 192, at p. 193;
Lane v. Westmoreland, 79 Ala. 372-374.

The action was properly brought upon the express contract of indemnity, notwithstanding a contract would be implied from the mere relation of principal and surety.

The ordinary rule is that a surety may pay the debt at any time he becomes liable therefor. It is unnecessary that suit be brought or judgment rendered or execution issue. It is enough if the surety be subject to be coerced to pay before he discharges the debt.

May v. Ball, 108 Ky. 180; 56 S. W. 7, at p. 9;
Nixon v. Beard, 12 N. E. 131, at p. 132; 111 Ind. 137.
Martin v. Ellerbe, 70 Ala. 326;
Franister v. Withrow, 12 W. Va. 611.

And it is unnecessary that the surety wait longer than the maturity of the debt.

Nixon v. Beard, *supra.*

And some authorities even hold that the surety may pay the debt before the maturity and at the maturity of the obligation may bring a suit for reimbursement against the principal.

Ross v. Menefee, 25 N. E. 545, at p. 546; 125 Ind. 432.

The rendition of judgment against the surety entitles him to pay the judgment without issuance of execution, and entitles the surety to protection even without paying the judgment.

Babbit v. Firm, 101 U. S. 7;

27 Am. & Eng. Ency. Law, 472, and cases cited in Note 16;

Union Trust Co. v. Morrison, 125 U. S. p. 591.

The mere affirmance of a judgment fixes the liability of the principal and sureties on the supersedeas bond, and no execution or other steps are necessary.

Davis v. Patrick, 57 Fed. 909.

Under these authorities it is apparent that when the Supreme Court affirmed the judgment of the District Court appealed from, and entered judgment against the principals and the surety for the amount of the judgment of the court be-

low, the liability of both became fixed, and unless restrained by some statute or rule of court, the execution may issue against both or either, and the plaintiff have collected the amount of the judgment. No further steps were necessary to fix the liability of the surety, and nothing remained for the surety except the mere payment of the judgment. The fact that under the Arizona statutes judgment is rendered against the surety on the supersedeas bond differentiates the case from Davis v. Patrick, *supra*, in that no suit was necessary on the appeal bond, and that the judgment of the Supreme Court was of necessity first executed. The filing of the mandate in the District Court was merely for the official information of that court but it gave no additional rights and created no liabilities. These were fixed by the judgment of the Supreme Court, and the filing of the mandate or the time for the filing was entirely immaterial.

Granting that the liability of the surety may be no greater than that of the principal, from the time of the entry of the judgment of the Supreme Court, or at least of the denial of the motion for rehearing, the liability of both principal and sureties was absolutely fixed, and the plaintiff had the absolute right (passing for the moment the question of the construction of paragraph 1007 of the Revised Statutes of the United States, which will be hereinafter considered) to issue ex-

ecution and collect from either or both, and this right, while perhaps subject to be arrested by the filing of a supersedeas bond, remained in full force until so arrested.

Appellant's right and duty to pay the judgment were not affected by paragraph 1007 of the Revised Statutes of the United States.

By such section one may obtain a supersedeas within sixty days after the rendition of judgment, and cannot obtain a supersedeas after the lapse of sixty days after the rendition of judgment, but this does not mean that a supersedeas exists for such sixty days; on the contrary, the closing sentence of the section expressly provides that "Where a writ of error *may* be a supersedeas" (to-wit, by the giving of security within sixty days after the rendition of such judgment) "execution shall not issue until the expiration of ten days."

In other words, in cases where a party is entitled to a writ of error, and a supersedeas by filing the proper security, the statute gives him without security, or any act whatever, a supersedeas for ten days after the rendition of the judgment. If he is diligent he may within such ten days file his security and obtain his supersedeas. If he is not diligent, after the expiration of such ten days, execution may issue and he may thereafter and during the next fifty days file the bond and arrest the execution if already issued. The

words of the statute, "execution shall not issue until the expiration of ten days," obviously mean ten days after the rendition of the judgment.

This was expressly held by the Supreme Court of the United States, in

Doyle v. Wisconsin, 94 U. S., p. 50.

After the expiration of such fifty days or of the total sixty days after the rendition of the judgment, then he could never under any circumstances obtain his supersedeas.

Section 1007 grants no right to the judgment debtor except a ten days' stay. On the contrary it limits the time within which he may obtain his supersedeas to sixty days after the rendition of the judgment. Therefore, the motion for rehearing having been denied on the 19th of May, on the 29th of May, Randolph might have issued execution against the surety company, appellant and under the authorities heretofore cited it was the duty and the right of the surety company upon demand, to pay the judgment.

Paragraph 410 of the Revised Statutes authorizes the governor to revoke the license of any surety company to transact any new business in this territory whenever it is conducting its business in violation of this act. One of the provisions of this act is that the non-payment of a judgment for more than thirty days after its rendition, shall constitute a forfeiture of all right to do business.

It would be the plain duty of the governor upon ascertaining these facts, to revoke the license of the company.

As a matter of fact the telegram from the governor to the appellant and from the appellant to the governor, were both in evidence in the deposition of Lang, although rejected as a part of the deposition of Cleaveland, and the defendants' objection thereto was overruled.

The fact that under the Arizona statute judgment is rendered against the surety on the supersedeas bond fixes the liability of the surety upon the rendition of the judgment by the Supreme Court. A judgment of the Supreme Court is of necessity self-executing. The Supreme Court of Arizona gives judgment itself. It does not direct the lower court to enter it. The sending of the mandate to the court below is merely the giving of official information to that court of the action of the Supreme Court, but such mandate gives no additional rights and creates no liabilities. These are fixed by the judgment of the Supreme Court, and in this case the filing of the mandate or the date of its filing was entirely immaterial.

As to the purpose of a mandate see:

Rev. Stat. Arizona, paragraphs 1525, 1526 and 1527.

VII.

It is submitted that the District Court made no error, and that the judgment of the Supreme Court should be reversed and the judgment of the District Court affirmed.

EUGENE S. IVES,
Attorney for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 125.

UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT,

vs.

A. SANDOVAL AND P. SANDOVAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

To the Supreme Court of the United States and to the Honorable Judges thereof:

Appellees, by their attorneys and counsel, hereby respectfully submit the following brief on their behalf:

Statement.

This action was brought for reimbursement to a surety upon an appeal bond made by appellant as surety and appellees as principals upon a covenant in said bond whereby the appellees agree "to reimburse said company (appellant herein) for any and all loss, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature, which said company (appellant herein) shall, or may, for any cause, at any time, sustain or incur, or be put to for, or by reason or in consequence of said company (appellant herein) having entered into, or executed said bond" (Tr., p. 3, fol. 5). Appellant secured judgment against appellees in said action on said covenant in the trial court for the sum of $11,484.95, which judgment was modified on appeal by the Supreme Court of the Territory of Arizona and reduced to $544.50, with interest (Tr., p. 96, fol. 197).

On the trial of the case in the district court of Arizona, defendants (appellees herein) established that during the period after the affirmance by the Supreme Court of the Territory of Arizona and before the perfecting of appeal to this court of the case of Randolph *vs.* A. Sandoval and P. Sandoval, now on appeal to this court, the said surety (appellant herein) on said appeal bond entered into an agreement with the said Randolph, by which said surety (appellant herein) did agree to and did pay to said Randolph the sum of $11,484.95, and

said Randolph agreed to and did, as part of said agreement, give to said surety (appellant herein) a bond of indemnity, with collateral security, the condition of which bond was that if the Supreme Court of the United States should reverse the judgment of the Supreme Court of the Territory of Arizona in the above-mentioned action that the said Randolph would pay to the said surety (appellant herein) the sum of $11,484.95, with interest, etc. That said payment to Randolph by the appellant herein was contingent on the giving of the bond and a part of the same transaction, as shown by the following testimony:

> "Mr. MORRISON: Mr. Ives, it is stipulated that the copy that is offered in evidence is an absolute copy of the original bond?
> "Mr. IVES: Yes, sir.
> "Mr. JUTTEN: And moreover, Mr. Ives, as a witness, you testify that that bond was executed by the parties?
> "Mr. IVES: On the date which it bears.
> "Mr. JUTTEN: And by the parties by whom it is apparently executed?
> "Mr. IVES: Yes, sir.
> "Mr. JUTTEN: In connection with this payment?
> "Mr. IVES: As testified to" (Tr., p. 49, fols. 105-6).

This testimony evidently refers to the previous testimony given by Mr. Ives on cross-examination as follows, to-wit:

> "Mr. MORRISON: Q. You said that the bond was executed as a part of the transaction with these people?

"A. Yes, I have the bond in my hand, or a copy of it.

"Q. That is a copy?

"A. Yes, sir, that is a copy" (Tr., p. 47, fol. 100).

In addition to this testimony, it is apparent from the following clause in the bond itself that the payment was conditional upon the execution of the bond and in consideration thereof, to-wit:

> "It is furthermore agreed, that the said Epes Randolph *in further consideration for the payment to him of the said sum of* $11,484.95 *as aforesaid*, and as collateral security for this bond, will deposit, and does herewith deposit, with the said The United States Fidelity & Guaranty Company, obligee, twenty-five thousand shares of the capital stock of Huntington Beach Company, a corporation organized under the laws of the State of California, with the right to the said The United States Fidelity & Guaranty Company, in the event that the said Randolph should fail to pay to the said company the full sum of $11,484.95 with interest as aforesaid, within ninety days after the reversal of the said judgment of the Supreme Court of the Territory of Arizona by the Supreme Court of the United States, to sell the said stock or so much thereof as may be necessary at public or private sale, upon thirty days' notice to the said Randolph; and to apply the proceeds thereof to the payment of the said sum of $11,484.95, with interest; the balance, if any, to be repaid to the said Randolph." (Italics ours.)
>
> (Tr., p. 74, fols. 156-7.)

The said bond also contained the following clause:

> "It is further agreed, that the said Randolph shall have the right to withdraw the said stock deposited herewith as collateral by the substitution therefor either of other collateral satisfactory to James H. Borland, or whoever may be his successor as manager of the United States Fidelity & Guaranty Company, or of a bond with individual sureties similarly satisfactory to the said Borland or his successor."
>
> (Tr., p. 75, fol. 157.)

ARGUMENT.

There is really but one question involved in this appeal. That is, was the said compromise arrangement made between the appellant and Randolph a payment such that, by the laws of suretyship, an action for reimbursement against the principals (the appellees) on the aforesaid appeal bond would lie before the contingency on which said compromise arrangement was conditioned should happen?

There can be no serious dispute as to the principles of suretyship which are decisive of this question. It is fundamental that the right to reimbursement of the surety from the principal is limited to the actual loss to the surety caused by its payment of the debt of the principal which it, the surety, is obliged to pay.

The law is stated in 1 Brandt on Suretyship, Guarantee (3d ed.), section 233, as follows:

> "If the surety extinguishes the debt of the principal for any sum less than the full amount thereof, he can, in the absence of express contract, only recover from the principal the amount paid by him, and interest thereon, and costs. The implied contract is that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal. If he pays in depreciated bank notes, or other money which is below par, but is taken by the creditor at par, he can only recover from the principal the par value of such money. * * * 'He is entitled to recover the amount paid, not the amount extinguished by that payment' (Bonney *vs.* Seely, 2 Wend., 481). * * * If the surety, who compounds a debt for which his principal and himself have become jointly liable, takes an assignment of the debt to a trustee for himself, he can only claim against his principal the amount which he has paid. He occupies in that regard the same position as an agent, and cannot speculate out of his principal."

See also—

Stone *vs.* Hammell, 83 Cal., 547.

Burrus *vs.* Cook (Mo.), 114 S. W., 1065.

12 Current Law, 2017, and cases cited.

The main contention of appellant (appellee in the territorial court) in the trial court was based on an obviously wrong conception of what constitutes a "payment" by the surety.

> "The very term payment, when voluntary and with full knowledge of the facts, excludes the idea of an implied promise to refund."

This was said in the case of Morton *vs.* Chandler, 6 Me., 142, at 144; and *a fortiori* the term "payment," when voluntary and with full knowledge of the facts, excludes the idea of an expressed promise to refund.

No merely possible or contingent loss is sufficient on which to base an action for reimbursement by the surety. At the time of the commencement of this suit appellant had actually lost nothing except his expenses (cf. Tr., p. 96, fol. 197). Under a certain contingency, to-wit, the affirmance by this court of the judgment of the Supreme Court of the Territory of Arizona in the case of Randolph *vs.* A. Sandoval and P. Sandoval, it might sustain an actual loss, but only upon the occurring of that contingency. In other words, appellant as surety on the original appeal bond and Randolph entered into a species of compromise of the judgment rendered against appellees in favor of Randolph.

The Supreme Court of the State of California, in the case of Stone *vs.* Hammell, *supra,* said:

> "If he (the surety) has compromised, he can recover only what the compromise has cost him."

Up to date the compromise agreement between appellant and Randolph has cost the appellant

nothing, and will not cost him anything except in the contingency that this court affirms the judgment in the aforementioned case.

The evidence showing the nature of the transaction, alleged by appellant to have been a payment of $11,484.95, which occurred between Randolph and appellant, is unequivocal and undisputed. It is true that the actual payment of the draft covering said alleged payment was made upon one day and the bond given by Randolph to appellant to secure it against loss in making said alleged payment was signed on a subsequent date, but all of the testimony and the bond itself, taken together, show unquestionably that the said alleged payment and the giving of the said bond was one and the same transaction, and that appellant would not have made such alleged payment except on the consideration of such security. Mr. Ives, attorney for appellant, himself, in his testimony at the trial, states on cross-examination:

> "Q. You said that the bond was executed as a part of the transaction with these people (the appellant corporation)?
>
> "A. Yes, I have the bond in my hand, or a copy of it."
>
> (Tr., p. 47, fol. 100.)

If there could be any possible doubt as to the significance of this admission under oath of appellant's attorney it is removed by the very words of the bond itself, which are:

"It is furthermore agreed that the said Epes Randolph, *in further consideration of the payment to him of said sum of* $11,-484.95 *as aforesaid, and as collateral security for this bond, will deposit, and does herewith deposit, with the said The United States Fidelity and Guaranty Company, obligee, twenty-five thousand shares of the capital stock,*" etc.

Thus this bond itself shows that the alleged payment was made in consideration of the giving of this bond, and that the bond was given in consideration of said payment, and the mere fact that the alleged payment was made on one day and the security given upon another does not make them separate transactions. The practical effect of this alleged payment was not an absolute payment which extinguished the obligation of the judgment recovered by Randolph against appellant and appellees herein; it was rather a loan, an advancement to the said Randolph by appellant of $11,-484.95, for which appellant took a bond and collateral security. And the right of Randolph to retain this loan or advancement as payment would mature only on the affirmance by this court of the decision of the Supreme Court of the Territory of Arizona in the aforesaid case, for should this court reverse that decision it is expressly agreed that said alleged payment would be refunded to the appellant. When Randolph made his demand upon appellant for the payment of said judgment, if it

had paid the money outright so that it had absolutely lost it, it might be conceded, this action could then have been commenced against appellees, but when it and Randolph entered into negotiations by which it did not make an absolute payment to Randolph, but simply advanced the money to him under an arrangement that said loan or advancement should become absolute upon the contingent action of this court in the aforesaid case, the appellant compromised the matter in such a way that it will sustain no actual loss until the action of this court upon said case and provided such action is favorable to said Randolph, and until it has sustained that loss, it is submitted, this action for reimbursement by the surety is premature. It is to be noted here that the Supreme Court of the Territory of Arizona in modifying the judgment of the trial court did it "without prejudice to the rights of the Guaranty Company (appellant herein) to bring such further action as may be necessary to establish its rights, should the right of reimbursement of the amount of the judgment accrue to it" (Tr., p. 96, fols. 197-8). It is, therefore, apparent that the rights of the appellant will not be substantially affected if this court affirm the judgment of the Supreme Court of the Territory of Arizona.

This settlement and compromise made between Randolph and appellant clearly comes within the doctrine that "a surety shall not speculate out of the principal." The very nature of this bond itself is a speculation, the benefit of which they, appel-

lees, under certain circumstances could not avail themselves. This becomes apparent on further inspection of the following clause of this bond (quoted *supra*) to-wit:

> "It is further agreed, that the said Randolph shall have the right to withdraw the said stock deposited herewith as collateral by the substitution therefor either of other collateral satisfactory to James H. Borland, or whoever may be his successor as manager of the United States Fidelity and Guaranty Company, or of a bond with individual sureties similarly satisfactory to the said Borland or his successor."
>
> (Tr., p. 75, fol. 157.)

Now, suppose that these appellees were compelled to pay at this time to appellant this sum of $11,484.95, then under this bond, by a collusion or mutual arrangement between Randolph and appellant, said Randolph could withdraw the presumably good security that he furnished appellant for the fulfillment of said bond and replace it by others which are absolutely worthless, and appellees would be absolutely helpless and unable to defend themselves against this juggling of the security. Surely this constitutes a speculation on the part of appellant as surety out of the principals, the appellees.

It may be urged by appellant that the giving of this bond with collateral security by Randolph was immaterial, because even if it and the security had

not been given by Randolph, still had it been determined eventually that Randolph was not entitled to the $11,484.95, he would be obligated by law to return the money to appellant. This specious argument begs the question at issue, which is, "Was there a payment?" and not the quite different question as to who would at the end of the litigation be legally liable.

In conclusion, we cannot summarize the position of appellees better than by quoting the following from the opinion of the Supreme Court of the Territory of Arizona (cf. Tr., p. 95, fols. 96-7), to-wit:

> "Under the testimony in this case, what loss has the Guaranty Company sustained? The payment made by it to Randolph cannot be said to have been an absolute one, but one conditioned that the judgment be affirmed by the Supreme Court, since it has taken and holds security satisfactory to it for the return of the money with interest, in the event the judgment is reversed. It may not suffer the loss of the amount paid to Randolph. If the judgment in this action is sustained, it will collect the amount from the appellant, and if the Supreme Court of the United States reverses the judgment appealed from, it will also be repaid by Randolph. Such a result would manifestly be inequitable. To sanction it would certainly do violence to 'the cardinal rule that the surety shall not speculate out of the principal.' The Guaranty Company, in taking the security, as pointed out by the authorities to which we have called attention, may be said

to have acted as the agent of the appellants. It took and still holds the security in its own name, and we do not think that it may claim reimbursement from its principals until its actual loss is ascertained, or at least that it may not recover without surrendering the security to its principals."

Appellees therefore respectfully submit the judgment of the Supreme Court of the Territory of Arizona should be affirmed.

Respectfully submitted,

G. BULLARD,
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HENRY S. VAN DYKE,
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HENRY S. VAN DYKE,
Of Counsel.

UNITED STATES FIDELITY AND GUARANTY COMPANY v. SANDOVAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 125. Submitted December 18, 1911.—Decided February 19, 1912.

Payment by a surety company of the amount of a supersedeas bond after affirmance of the judgment by the Supreme Court of the Territory and notice by the Governor of the State of non-payment by the principals and that unless the judgment were paid forthwith, or excuse for non-payment shown, the company would forfeit its right to transact business in the Territory, is not a voluntary payment even if the Governor had no power to revoke the license, no ruling to such effect having been made prior to the payment.

The fact that an appeal was subsequently taken by the judgment debtors to this court from the judgment, and that on payment thereof the surety company took security for repayment from the judgment creditor in the case of reversal, does not diminish the right of the surety company to collect from the principals the amount of the debt and all of its expenses as agreed in the application for the bond.

This court will take notice of its own decision in determining the rights of surety and principal on a supersedeas bond given to secure a judgment which was subsequently affirmed by this court.

12 Arizona, 348, reversed.

THE facts are stated in the opinion.

Mr. Eugene S. Ives for appellant.

Mr. Henry S. Van Dyke and *Mr. Frank P. Flint*, with whom *Mr. G. Bullard* was on the brief, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action to recover the sum of $10,528.33 and certain

expenses on account of a judgment recovered against appellees and paid by appellant as surety on an appeal bond executed at the request of appellees.

The action was brought and tried in the District Court of Santa Cruz County, Second Judicial District of the Territory of Arizona, and resulted in a judgment for the sum of $14,683.25 in favor of appellant. On appeal to the Supreme Court of the Territory the judgment was reversed. Thereupon the case was brought here.

There is no dispute about the facts. One Epes Randolph recovered a judgment against the appellees for the sum of $10,528.33, from which they appealed to the Supreme Court of the Territory. They applied to appellant for a bond to be given on appeal to stay the judgment. In the application for the bond they covenanted "to reimburse said company [appellant] for any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature, which said company shall, or may, for any cause, at any time, sustain or incur, or be put to for, or by reason or in consequence of said company having entered into, or executed said bond."

The judgment against appellees was affirmed by the Supreme Court and a judgment rendered against them, and the Guaranty Company (appellant here) for the amount recovered in the lower court, with interest and costs, on the twenty-seventh of March, 1908.

About the twenty-fourth of June, 1908, the company received notice from the Governor of the Territory to the effect that the judgment of the Supreme Court had not been paid; that more than thirty days had elapsed from its rendition, and that unless it was paid or sufficient excuse for its non-payment shown, the company would forfeit its rights to transact business as a surety company in Arizona. The company notified appellees by telegraph of this notice, but they failed to pay the judgment or to perfect an appeal from it to this court, and therefore the

company (appellant) paid Randolph the amount due on the judgment and interest amounting to the sum of $11,484.95. The appellant also incurred certain expenses which, with the judgment paid, amounted in all to the sum of $13,911.70.

With unimportant variations, the complaint alleged the facts which were found by the court. The appellees demurred to the complaint for insufficiency and also answered, denying some of its allegations and admitting others. They admitted the recovery of judgment against them and the application for the bond, but denied that the surety company had received notice from the Governor, as alleged, or that the company paid Randolph for them in satisfaction of the judgment any sum of money or that any sum was due. They alleged that after the judgment was affirmed by the Supreme Court of the Territory and a rehearing denied, notice of appeal to this court was duly given and that the cause was transferred to this court, where it was at the time of the answer; that no execution had been issued on the judgment and that if the company had paid the judgment it did so by reason of its own negligence, voluntarily, and not at the request of appellees, or by any order of the court, or in satisfaction of the judgment.

"The testimony shows," the Supreme Court said (p. 352), "that on March 27, 1908, the judgment of the district court was affirmed in this court, and that pursuant to the provisions of paragraph 1592, Civil Code of 1901, judgment was also entered against the Guaranty company as surety upon the appeal bond. Thereafter, within the time allowed by law, a motion for a rehearing was made, which motion was denied by this court May 19, 1908. The action having been tried before the court without a jury, an appeal to the supreme court of the United States from the judgment of the court was prayed, and was allowed by one of the justices of the court on

June 20, 1908. In the order allowing the appeal it was directed that the judgment be stayed upon the appellants filing their supersedeas bond in the sum of $20,000, to be approved by any justice of this court. This order was filed with the clerk June 22, 1908. A bond in proper form was approved by one of the justices on July fourteenth, and filed with the clerk on July 15, 1908. Citation was issued July 18, 1908, and served on July 31, 1908. It also appears that on or about June 18th, the judgment creditor, Randolph, demanded of the Guaranty company that it pay the judgment; that on June 24, 1908, the Guaranty company paid the judgment in full, and thereafter, and as a part of this transaction, took from Randolph a bond, with collateral security, for the return of the amount paid him, with interest, should the supreme court of the United States reverse the judgment of this court."

The Supreme Court sustained the trial court in holding the complaint sufficient and stating a cause of action, but it decided that the court erred in giving judgment for the amount paid by the company to Randolph, because it had not surrendered to appellees, its principals, the security it had taken from Randolph. The court, however, decided (p. 359) that the company could recover from appellees "such amounts as it reasonably expended in connection with the adjustment of the matter, for which it holds no security." These expenses were found to amount to the sum of $544.50, upon which interest was adjudged at 6 per cent from August 3, 1908, to the date of the judgment. The judgment of the District Court was modified and reduced to the amount indicated, and, as modified, affirmed, "but without prejudice to the rights of the Guaranty company to bring such further action as may be necessary to establish its rights, should a right to reimbursement of the amount of the judgment accrue to it."

The bond taken by appellant of Randolph, the judg-

ment creditor, is made the determining element by the Supreme Court of the Territory. The bond was the outcome of certain conversations, prior to the payment of the judgment, between a representative of the company and Randolph. A disagreement arose as to the effect of the conversations, the representative contending that Randolph agreed to refund the money if it should appear under any proceeding which should be started that it was not proper for the company to have paid the money. Randolph's attorney contended that as a supersedeas bond might have been filed at the very moment that the money was being paid, in the event that it should transpire that such bond was filed prior to the payment, Randolph would return the money. In consequence of this dispute, Randolph executed a bond to the Guaranty Company in the sum of $20,000, which recited the proceedings in the litigation and payment of the judgment to Randolph, and that the appellees herein were, on the twenty-fourth of June, 1908, proceeding to appeal to the Supreme Court of the United States, but had not, on said date, perfected their appeal, but "have, at the date of these presents, duly appealed to the Supreme Court of the United States from the said judgment," it was agreed that if that court should affirm the judgment, or if it should reverse the judgment and Randolph should refund the money paid to him by the company, then the obligation to be void, otherwise to remain in full force and effect. Randolph further agreed as collateral security for the bond that he would deposit, and he did deposit, with the Guaranty Company 25,000 shares of the capital stock of the Huntington Beach Company with the right in the company, if Randolph should not refund the money after the reversal of the judgment by the Supreme Court of the United States, to sell the stock and apply the proceeds to the payment of the amount paid by it, the company. Upon the affirmance of the judgment or dismissal of the appeal

the stock was to be returned to Randolph, and Randolph had the right to withdraw such stock and substitute other collateral security.

The Supreme Court of the Territory, as we have seen, made this bond and security the controlling factor in its decision. The court held that the payment of the judgment was not premature—in other words, not voluntary. In this we agree with the court. Appellant was not bound to await the issuance of an execution. The affirmance of the judgment fixed its liability. *Babbitt* v. *Finn*, 101 U. S. 7, 15. And in determining the character of the payment as voluntary or negligent, as alleged by appellees in their answer, the threat of the Governor must be given account, even if it be granted that he had no power, as held by the Supreme Court of the Territory in this case, to revoke the license of appellant to do business in the Territory. Such ruling had not then been made, and an attempted exercise of such power would have been injurious to appellant to yield to or resist. Appellant certainly acted in good faith, and discharged the duty that it was assured it had assumed under the law. However, this may not be of consequence, and we pass to the consideration of the ground upon which the Supreme Court of the Territory based its decision. The court held, as we have seen, that appellant was justified in paying the judgment, and, having paid the judgment, it was entitled to reimbursement, but to no more, the court said, than reimbursement, and held that the only outlay it had incurred was for certain expenses, and limited the judgment to their amount.

The court argued that appellant was secured for all else, and that therefore its payment was not "an absolute one, but one conditioned that the judgment be affirmed by the Supreme Court, since it has taken and holds security satisfactory to it for the return of the money with interest, in the event the judgment is re-

versed." And such event happening, the court concluded, would result in the payment to appellant twice. In other words, if the judgment should be sustained it would collect the amount of appellees; if the judgment should be reversed it would collect the amount of Randolph. This, the court said, would be inequitable and that therefore appellant could not "claim reimbursement from its principals until its actual loss is ascertained, or at least that it may not recover without surrendering the security to its principals."

The court's conclusion, we think, is not justified. It would indeed be inequitable to permit appellant to collect more than once the money paid by it, but once, at least, it is entitled, a result which it seeks by this suit. Having paid money for its principals it did not "speculate" out of them by reinforcing their responsibility to it by taking security from Randolph. It was bound by the judgment, which it paid equally with appellees, though on account of them. It was under an absolute duty to pay, but there were contingencies upon which the payment would have to be refunded by Randolph, and to secure itself it took security from him. We repeat, it was not speculating out of its principals, but was benefiting them. It acquired securities to which they could be subrogated in the event the judgment obtained by Randolph should be reversed. This represents the parties' rights on this record. In addition, however, we may say that we know that the judgment was not reversed and that appellees' liability to Randolph has been affirmed. *Sandoval* v. *Randolph*, 222 U. S. 161.

Judgment reversed and cause remanded to the Supreme Court of the State of Arizona for further proceedings not inconsistent with this opinion.